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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 727

THE SHAMROCK OIL AND GAS CORPORATION, PETITIONER,

vs.

G. OBIE SHEETS AND CHESTER SHEETS, DOING BUSINESS AS FRIONA INDEPENDENT OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 30, 1941.

CERTIORARI GRANTED MARCH 10, 1941.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 25, 1941.

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CAPTION.

BE IT REMEMBERED that at a term of the District Court of the United States in and for the Northern District of Texas, Amarillo Division, at Amarillo, Texas, begun and holden on the 18th day of September, 1939, and which was adjourned on May 11, 1939, the Honorable James C. Wilson, United States District Judge for the Northern District of Texas, presiding, the following proceedings were had, and the following cause came on for trial and was tried, to-wit:

CIVIL ACTION No. 73.

THE SHAMROCK OIL AND GAS CORPORATION,
Complainant,

versus

G. OBIE SHEETS AND CHESTER SHEETS, doing business as FRIONA INDEPENDENT OIL COMPANY,
Defendants.

2 PLAINTIFF'S ORIGINAL PETITION.

Filed: 5-11-39, 7-1-39.

In the 108th District Court of Potter County, Texas.

No. 14531.

State of Texas,
County of Potter.

Comes now The Shamrock Oil and Gas Corporation hereinafter called Plaintiff, complaining of G. Obie Sheets

and Chester Sheets, forming the partnership of and doing business as and in the name Friona Independent Oil Company, hereinafter called defendants, and for cause of action would allege and show:

1.

That the plaintiff is a corporation incorporated under the laws of the State of Delaware and holding a permit from the Secretary of State of the State of Texas, to do business in the State of Texas with an office and place of business in Amarillo, Potter County, Texas; that the defendants reside in Parmer County, Texas.

2.

That heretofore on the various dates set out in the attached Exhibit "A" to which reference is here made and same is made a part hereof by reference, the plaintiff, at the special instance and request of the defendants, sold and delivered to the defendants the various goods, wares and merchandise set out in the attached Exhibit "A" charging the defendants therefor the usual, customary and reasonable amount for said goods, wares and merchandise upon the dates that said goods, wares and merchandise were furnished and delivered to the defendants.

3.

Plaintiff would further show that upon various dates the defendants paid to plaintiff various sums upon the account due and owing by defendants to plaintiff, all as is set out in the attached Exhibit and that said sums and each and all of said sums so paid by defendants to plaintiff were duly credited upon the account due and owing by defendants to plaintiff.

4.

Plaintiff would allege and show that as is set out in the attached account that the defendants are indebted to the plaintiff in the balance of $5390.42 and that though often requested the defendants have failed and refused to pay the balance of said account in such sum or any part thereof to the plaintiff's damage in the amount of its debt.

Wherefore, premises considered plaintiff prays that the defendants be cited to appear herein and that upon final hearing the plaintiff have and recover judgment of and against the defendants jointly and severally for the amount of its debt as set out in the attached verified account, together with interest thereon at the legal rate from the respective dates that said sum was due, for costs of suit and for such other and further relief to which plaintiff may show itself entitled.

UNDERWOOD, JOHNSON,
DOOLEY & WILSON,
Attorneys for Plaintiff.

EXHIBIT "A."

Friona Independent Oil Company,

Friona, Texas.

Statement of Account.

Date 1938	Invoice Number			Account Debit	Credit	Balance
June 16	61459	255 gal. 70-72	13.71			
		805 gal. 3rd grade	37.23			
		State Tax	42.40			
		Federal Tax	10.60	102.03		
17	61500	1060 gal. 3rd grade	49.03			
		State Tax	42.40			
		Federal Tax	10.60	2702.03		
17	61520	504 gal. 70-72	27.09			
		556 gal. 3rd grade	25.72			
		State Tax	53.00			
		Federal Tax	10.60	116.41		
17	89	Lube Oil	26.01	26.01		

18	61548	242 gal. 70-72	13.01	
		892 gal. 3rd grade	41.26	
		State Tax	45.36	
		Federal Tax	11.34	110.97
19	61592	1059 gal. 3rd grade	48.98	
		State Tax	42.36	
		Federal Tax	10.59	101.93
20	61628	1057 gal. 3rd grade	48.89	
		State Tax	42.28	
		Federal Tax	10.59	101.74
21	61668	254 gal. 70-72	13.65	
		803 gal. 3rd grade	37.14	
		State Tax	42.28	
		Federal Tax	10.57	103.64
21	61715	1059 gal. 3rd grade	48.98	
		State Tax	42.36	
		Federal Tax	10.59	101.93
21	107	Greases	17.40	17.40

Date 1938	Invoice Number			Account Debit	Credit	Balance
21	110	Lube Oil	19.80	19.80		
22	61744	254 gal. 70-72	13.65			
		803 gal. 3rd grade	37.14			
		State Tax	42.28			
		Federal Tax	10.57	103.64		
23	61785	1057 gal. 3rd grade	48.89			
		State Tax	42.28			
		Federal Tax	10.57	101.74		
23	61818	1052 gal. 3rd grade	48.66			
		State Tax	42.08			
		Federal Tax	10.52	101.26		
23	61832	254 gal. 70-72	13.65			
		803 gal. 3rd grade	45.17			
		State Tax	42.28			
		Federal Tax	10.57	111.67		
24	61864	1056 gal. 3rd grade	48.84			
		State Tax	42.24			
		Federal Tax	10.56	101.64		

26	61960	255 gal. 70-72	14.03	
		805 gal.	38.24	
		State Tax	42.40	
		Federal Tax	10.60	105.27
27	45002	1059 gal. 3rd grade	50.30	
		State Tax	42.36	
		Federal Tax	10.59	103.25
28	56265	1057 gal. 3rd grade	50.21	
		State Tax	42.28	
		Federal Tax	10.57	103.06
28	56294	556 gal. 70-72	30.58	
		503 gal. 3rd grade	23.89	
		State Tax	42.36	
		Federal Tax	10.59	107.42
June 23	119	Lube Oil	19.80	19.80
28	135	Lube Oil	6.90	6.90
28	137	Greases	11.63	11.63
29	56328	502 gal. 70-72	27.61	

Date 1938	Invoice Number			Account Debit	Credit	Balance
		554 gal. 3rd grade	26.32			
		State Tax	52.80			
		Federal Tax	10.56	117.29		
30	56400	254 gal. 70-72	13.97			
		802 gal. 3rd grade	38.10			
		State Tax	42.24			
		Federal Tax	10.56	104.87		
July 1	150	Lube Oil & Greases	26.72	26.72		
3	156	Lube Oil	19.98	19.98		
1	56457	1056 gal. 3rd grade	50.16			
		State Tax	42.24			
		Federal Tax	10.56	102.96		
July 2	45074	254 gal. 70-72	14.29			
		802 gal. 3rd grade	38.10			
		State Tax	42.24			
		Federal Tax	10.56	105.19		
2	45078	1133 gal. 3rd grade	53.82			

		State Tax	45.32	
		Federal Tax	11.33	110.47
3	45097	553 gal. 70-72	31.11	
		501 gal. 3rd grade	23.80	
		State Tax	42.16	
		Federal Tax	10.54	107.61
3	45098	1128 gal. 3rd grade	53.58	
		State Tax	45.12	
		Federal Tax	11.28	109.98
3	45109	1052 gal. 3rd grade	49.97	
		State Tax	42.08	
		Federal Tax	10.52	102.57
4	45140	1055 gal. 3rd grade	50.11	
		State Tax	42.20	
		Federal Tax	10.55	102.86
4	45152	1130 gal. 3rd grade	53.68	
		State Tax	45.20	
		Federal Tax	11.30	110.18

Date 1939	Invoice Number			Account Debit	Credit	Balance
4	45166	1053 gal. 3rd grade	50.02			
		State Tax	42.12			
		Federal Tax	10.53	102.67		
4	45176	1056 gal. 3rd grade	50.16			
		State Tax	42.24			
		Federal Tax	10.56	102.96		
July 5	45214	553 gal. 70-72	31.11			
		501 gal. 3rd grade	23.80			
		State Tax	42.16			
		Federal Tax	10.54	107.61		
5	45242	1053 gal. 3rd grade	50.02			
		State Tax	42.12			
		Federal Tax	10.53	102.67		
4	164	Lube Oil	25.50	25.50		
6	174	Lube Oil	14.49	14.49		
6	45270	1053 gal. 3rd grade	50.02			
		State Tax	42.12			
		Federal Tax	10.53	102.67		

	6	45304	253 gal. 70-72	14.23	
			800 gal. 3rd grade	38.00	
			State Tax	42.12	
			Federal Tax	10.53	104.88
	8	45409	1053 gal. 3rd grade	50.02	
			State Tax	42.12	
			Federal Tax	10.53	102.67
July	8	45431	500 gal. 70-72	28.13	
			552 gal. 3rd grade	26.22	
			State Tax	52.60	
			Federal Tax	10.52	117.47
	8	45441	241 gal. 70-72	13.56	
			890 gal. 3rd grade	42.28	
			State Tax	45.24	
			Federal Tax	11.31	112.39
	8	195	Lube Oil	2.76	2.76
	9	45472	1127 gal. 3rd grade	53.53	
			State Tax	45.08	
			Federal Tax	11.27	109.88

Date 1939	Invoice Number			Account Debit	Credit	Balance
9	45480	1052 gal. 3rd grade	49.97			
		State Tax	42.08			
		Federal Tax	10.52	102.57		
9	45487	1056 gal. 3rd grade	50.16			
		State Tax	42.24			
		Federal Tax	10.56	102.96		
July 10	45518	1127 gal. 3rd grade	53.53			
		State Tax	45.08			
		Federal Tax	11.27	109.88		
10	45519	500 gal. 70-72	28.13			
		552 gal. 3rd grade	26.22			
		State Tax	42.08			
		Federal Tax	10.52	106.95		
10	45530	1053 gal. 3rd grade	50.02			
		State Tax	42.12			
		Federal Tax	10.35	102.67		
10	201	Greases	18.00	18.00		

11	45670	1052 gal. 3rd grade	49.97	
		State Tax	42.08	
		Federal Tax	10.52	102.57
11	45585	1053 gal. 3rd grade	50.02	
		State Tax	42.12	
		Federal Tax	10.53	102.67
12	207	Lube Oil	20.35	20.35
12	45608	1053 gal. 3rd grade	50.02	
		State Tax	42.12	
		Federal Tax	10.53	102.67
12	45641	1051 gal. 3rd grade	49.92	
		State Tax	42.04	
		Federal Tax	10.51	102.47
July 12	45647	253 gal. 70-72	14.23	
		800 gal. 3rd grade	38.00	
		State Tax	42.12	
		Federal Tax	10.53	104.88
13	45687	253 gal. 70-72	14.23	
		799 gal. 3rd grade	37.95	

Date 1938	Invoice Number			Account Debit	Credit	Balance
		State Tax	42.08			
		Federal Tax	10.52	104.78		
14	210	Greases	16.50	16.50		
14	45718	1056 gal. 3rd grade	50.16			
		State Tax	42.24			
		Federal Tax	10.56	102.96		
14	45740	253 gal. 70-72	14.23			
		800 gal. 3rd grade	38.00			
		State Tax	42.12			
		Federal Tax	10.53	104.88		
14	45753	1056 gal. 3rd grade	50.16			
		State Tax	42.24			
		Federal Tax	10.56	102.96		
15	45770	255 gal. 70-72	14.34			
		804 gal. 3rd grade	38.19			
		State Tax	42.36			
		Federal Tax	10.59	105.48		

16	45842	254 gal. 70-72	14.29	
		802 gal. 3rd grade	38.10	
		State Tax	42.24	
		Federal Tax	10.56	105.19
16	45870	254 gal. 70-72	14.29	
		801 gal. 3rd grade	38.05	
		State Tax	42.20	
		Federal Tax	10.55	105.09
17	45903	1057 gal. 3rd grade	50.21	
		State Tax	42.28	
		Federal Tax	10.57	103.06
18	45957	1055 gal. 3rd grade	50.11	
		State Tax	42.20	
		Federal Tax	10.55	102.86
19	45980	1056 gal. 3rd grade	50.16	
		State Tax	42.24	
		Federal Tax	10.56	102.96
19	46013	253 gal. 70-72	14.23	
		800 gal. 3rd grade	38.00	

Date 1938	Invoice Number			Account Debit	Credit	Balance
		State Tax	42.12			
		Federal Tax	10.53	104.88		
July 18	230	Greases	20.45	20.45		
20	45035	1056 gal. 3rd grade	50.16			
		State Tax	42.24			
		Federal Tax	10.56	102.96		
21	46134	554 gal. 70-72	31.16			
		502 gal. 3rd grade	23.85			
		State Tax	42.24			
		Federal Tax	10.56	107.81		
22	46153	1057 gal. 3rd grade	50.21			
		State Tax	42.28			
		Federal Tax	10.57	103.06		
22	46179	502 gal., 70-72	28.24			
		555 gal. 3rd grade	26.36			
		State Tax	52.85			
		Federal Tax	10.57	118.02		

22	248	Lube Oil	20.35	20.35
24	46262	1055 gal. 3rd grade	50.11	
		State Tax	42.20	
		Federal Tax	10.55	102.86
July 25	26292	1057 gal. 3rd grade	50.21	
		State Tax	42.28	
		Federal Tax	10.57	103.06
25	46338	254 gal. 70-72	14.29	
		802 gal. 3rd grade	38.10	
		State Tax	42.24	
		Federal Tax	10.56	105.19
25	252	Lube Oil	10.56	105.19
26	46367	1056 gal. 3rd grade	50.16	
		State Tax	42.24	
		Federal Tax	10.56	102.96
27	46477	1055 gal. 3rd grade	50.11	
		State Tax	42.20	
		Federal Tax	10.55	102.86

Date 1938	Invoice Number			Account Debit	Credit	Balance
26	255	Lube Oil	19.98	19.98		
28	263	Lube Oil	5.64	5.64		
28	46492	254 gal. 70-72	14.29			
		802 gal. 3rd grade	38.10			
		State Tax	42.24			
		Federal Tax	10.56	105.19		
28	46527	253 gal. 70-72	14.23			
		800 gal. 3rd grade	38.00			
		State Tax	42.12			
		Federal Tax	10.53	104.88		
28	46540	1057 gal. 3rd grade	50.21			
		State Tax	42.28			
		Federal Tax	10.57	103.06		
29	268	Lube Oil	11.28	11.28		
29	46574	1055 gal 3rd grade	50.11			
		State Tax	42.20			
		Federal Tax	10.55	102.86		

30	46610	1056 gal. 3rd grade	50.16	
		State Tax	42.24	
		Federal Tax	10.56	102.96
30	46645	1053 gal. 3rd grade	50.02	
		State Tax	42.12	
		Federal Tax	10.53	102.67
30	273	Lube Oil	20.35	20.35
Aug. 1	46695	554 gal. 70-72	31.16	
		502 gal. 3rd grade	23.85	
		State Tax	42.24	
		Federal Tax	10.56	107.81
1	46741	1053 gal. 3rd grade	50.02	
		State Tax	42.12	
		Federal Tax	10.53	102.67
2	46754	1055 gal. 3rd grade	50.11	
		State Tax	42.20	
		Federal Tax	10.55	102.86
2	46789	1053 gal. 3rd grade	50.02	
		State Tax	42.12	

Date 1938	Invoice Number			Account Debit	Credit	Balance
		Federal Tax	10.53	102.67		
3	46855	1053 gal. 3rd grade	50.02			
		State Tax	42.12			
		Federal Tax	10.53	102.67		
4	46910	253 gal. 70-72	14.23			
		799 gal. 3rd grade	37.95			
		State Tax	42.08			
		Federal Tax	10.52	104.78		
4	46925	553 gal. 70-72	31.11			
		501 gal. 3rd grade	23.80			
		State Tax	52.70			
		Federal Tax	10.54	118.15		
Aug. 5	46979	253 gal. 70-72	14.23			
		799 gal. 3rd grade	37.95			
		State Tax	42.08			
		Federal Tax	10.52	104.78		
5	46992	254 gal. 70-72	14.29			
		801 gal. 3rd grade	38.05			

		State Tax	42.20	
		Federal Tax	10.55	105.09
6	62032	1052 gal. 3rd grade	49.97	
		State Tax	42.08	
		Federal Tax	10.52	102.57
7	62072	1052 gal. 3rd grade	49.97	
		State Tax	42.08	
		Federal Tax	10.52	102.57
8	62091	253 gal. 70-72	14.23	
		800 gal. 3rd grade	38.00	
		State Tax	42.12	
		Federal Tax	10.53	104.88
8	62116	1052 gal. 3rd grade	49.97	
		State Tax	42.08	
		Federal Tax	10.52	102.57
9	62173	253 gal. 70-72	14.23	
		799 gal. 3rd grade	37.95	
		State Tax	42.08	
		Federal Tax	10.52	104.78

Date 1938	Invoice Number			Account Debit	Credit	Balance
9	303	Grease	15.35	15.35		
10	62195	1055 gal. 3rd grade	50.11			
		State Tax	42.20			
		Federal Tax	10.55	102.86		
11	311	Lube Oil	11.28	11.28		
11	62268	1053 gal. 3rd grade	50.02			
		State Tax	42.12			
		Federal Tax	10.53	102.67		
12	62328	253 gal. 70-72	14.23			
		800 gal. 3rd grade	38.00			
		State Tax	42.12			
		Federal Tax	10.53	104.88		
12	62358	522 gal. 70-72	31.05			
		500 gal. 3rd grade	23.75			
		State Tax	52.60			
		Federal Tax	10.52	117.92		
15	62445	300 gal. 70-72	16.88			
		756 gal. 3rd grade	35.91			

		State Tax	42.24	
		Federal Tax	10.56	105.59
17	62568	254 gal. 70-72	14.29	
		802 gal. 3rd grade	38.10	
		State Tax	42.24	
		Federal Tax	10.56	105.19
17	334	Lube Oil	5.64	5.64
19	62692	501 gal. 70-72	28.18	
		553 gal. 3rd grade	26.27	
		State Tax	42.16	
		Federal Tax	10.54	107.15
19	340	Lube Oil	20.35	20.35
Aug. 23	62347	501 gal. 70-72	28.18	
		553 gal. 3rd grade	26.27	
		State Tax	42.16	
		Federal Tax	10.54	107.15
26	62993	502 gal. 70-72	28.24	
		554 gal. 3rd grade	26.32	

Date 1938	Invoice Number			Account Debit	Credit	Balance
		State Tax	42.24			
		Federal Tax	10.56	107.36		
27	63058	501 gal. 70-72	28.18			
		553 gal. 3rd grade	26.27			
		State Tax	52.70			
		Federal Tax	10.54	117.69		
26	361	Lube Oil	19.98	19.98		
29	63129	501 gal. 70-72	28.18			
		553 gal. 3rd grade	26.27			
		State Tax	42.16			
		Federal Tax	10.54	107.15		
31	63221	253 gal. 70-72	13.60			
		800 gal. 3rd grade	36.00			
		State Tax	42.12			
		Federal Tax	10.53	102.25		
31	281	Lube Oil	19.98	19.98		
Sept. 2	63275	1056 gal. 3rd grade	47.52			

		State Tax	42.24	
		Federal Tax	10.56	100.32
3	63329	254 gal. 70-72	13.65	
		802 gal. 3rd grade	36.09	
		State Tax	42.24	
		Federal Tax	10.56	102.54
4	63357	254 gal. 70-72	13.65	
		803 gal. 3rd grade	36.14	
		State Tax	42.28	
		Federal Tax	10.57	102.64
3	390	Lube Oil	8.46	8.46
6	63429	255 gal. 70-72	13.71	
		807 gal. 3rd grade	36.32	
		State Tax	42.48	
		Federal Tax	10.62	103.13
7	63450	505 gal. 70-72	27.14	
		558 gal. 3rd grade	25.11	
		State Tax	53.15	
		Federal Tax	10.63	116.03

Date 1938	Invoice Number			Account Debit	Credit	Balance
8	63519	255 gal. 70-72	13.71			
		806 gal. 3rd grade	36.27			
		State Tax	42.44			
		Federal Tax	10.61	103.03		
9	63555	1060 gal. 3rd grade	47.70			
		State Tax	42.40			
		Federal Tax	10.60	100.70		
10	63600	255 gal. 70-72	13.71			
		804 gal. 3rd grade	36.18			
		State Tax	42.36			
		Federal Tax	10.59	102.84		
11	63645	1056 gal. 3rd grade	47.52			
		State Tax	42.24			
		Federal Tax	10.56	100.32		
10	413	Lube Oil	5.64	5.64		
11	417	Lube Oil	23.17	23.17		
Sept. 12	63701	254 gal. 70-72	13.65			
		802 gal. 3rd grade	36.09			

		State Tax	42.24	
		Federal Tax	10.56	102.54
13	63711	806 gal. 3rd grade	36.27	
		State Tax	32.24	
		Federal Tax	8.06	
		25[illegible] gal. Kerosene	12.11	88.68
13	63748	804 gal. 3rd grade	36.18	
		255 gal. Kerosene	12.11	
		State Tax	32.16	
		Federal Tax	8.04	88.49
13	425	Grease	7.00	7.00
14	63776	255 gal. 70-72	13.71	
		805 gal. 3rd grade	36.23	
		State Tax	42.40	
		Federal Tax	10.60	102.94
14	63813	1060 gal. 3rd grade	47.70	
		State Tax	42.40	
		Federal Tax	10.60	100.70
15	431	Lube Oil	19.98	19.98

Date 1938	Invoice Number			Account Debit	Credit	Balance
16	442	Greases	8.78	8.78		
16	63917	255 gal. 70-72	13.71			
		806 gal. 3rd grade	36.27			
		State Tax	42.44			
		Federal Tax	10.61	103.03		
16	63933	1061 gal. 3rd grade	47.75			
		State Tax	42.44			
		Federal Tax	10.61	100.80		
17	63940	255 gal. 70-72	13.71			
		807 gal. 3rd grade	36.32			
		State Tax	42.48			
		Federal Tax	10.62	103.13		
17	63975	505 gal. 70-72	27.14			
		558 gal. 3rd grade	25.11			
		State Tax	53.15			
		Federal Tax	10.63	116.03		
19	64014	255 gal 70-72	13.71			
		807 gal. 3rd grade	36.32			

		State Tax	42.48	
		Federal Tax	10.62	103.13
19	64052	1060 gal. 3rd grade	47.70	
		State Tax	42.40	
		Federal Tax	10.60	100.70
20	459	Greases	9.75	9.75
20	64069	1065 gal. 3rd grade	47.93	
		State Tax	42.60	
		Federal Tax	10.65	101.18
Sept. 20	64099	255 gal. 70-72	13.71	
		807 gal. 3rd grade	36.32	
		State Tax	42.48	
		Federal Tax	10.62	103.13
23	64242	255 gal. 70-72	13.71	
		807 gal. 3rd grade	36.32	
		State Tax	42.48	
		Federal Tax	10.62	103.13
Oct. 17	542	Lube Oil	2.82	2.82

Date 1938	Invoice Number			Account Debit	Credit	Balance
18	66048	1066 gal. 3rd grade	45.31			
		State Tax	42.64			
		Federal Tax	10.66	98.61		
20	66116	259 gal. 70-72	13.27			
		819 gal. 3rd grade	34.81			
		State Tax	43.12			
		Federal Tax	10.78	101.98		
20	550	Lube Oil	19.98	19.98		
21	554	Lube Oil	19.98	19.98		
21	66144	1074 gal 3rd grade	42.96			
		State Tax	42.96			
		Federal Tax	10.74	96.66		
22	66215	305 gal. 70-72	14.87			
		768 gal. 3rd grade	30.72			
		State Tax	42.72			
		Federal Tax	10.73	99.24		
24	66274	509 gal. 70-72	24.81			
		562 gal. 3rd grade	22.48			

		State Tax	42.82	
		Federal Tax	10.71	100.84
25	66317	510 gal. 70-72	24.86	
		563 gal. 3rd grade	22.52	
		State Tax	53.65	
		Federal Tax	10.73	111.76
26	66357	258 gal. 70-72	12.58	
		815 gal. 3rd grade	32.60	
		State Tax	42.92	
		Federal Tax	10.73	98.83
27	65929	1069 gal. 3rd grade	41.42	
		State Tax	42.76	
		Federal Tax	10.69	94.87
28	66456	304 gal. 70-72	14.82	
		765 gal. 3rd grade	30.60	
		State Tax	42.76	
		Federal Tax	10.69	98.87
30	66529	812 gal. 70-72	39.59	
		257 gal. 3rd grade	10.28	

Date 1938	Invoice Number			Account Debit	Credit	Balance
		State Tax	42.76			
		Federal Tax	10.69	103.32		
30	66530	1145 gal. 3rd grade	61.54			
		State Tax	45.80			
		Federal Tax	11.45	118.79		
31	65996	1066 gal. 3rd grade	41.31			
		State Tax	42.64			
		Federal Tax	10.66			
		55 Lube Oil	20.35	114.96		
Nov. 3	600	Lube Oil & Grease	11.52	11.52		
3	66714	511 gal. 70-72	24.91			
		564 gal. 3rd grade	22.56			
		State Tax	43.00			
		Federal Tax	10.75	101.22		
4	66754	511 gal. 70-72	24.91			
		564 gal. 3rd grade	22.56			
		State Tax	53.75			
		Federal Tax	10.75	111.97		

5	607	Lube Oil	5.64	5.64
5	66811	512 gal. 70-72	24.96	
		566 gal. 3rd grade	22.64	
		State Tax	43.12	
		Federal Tax	10.78	101.50
Sept. 24	64265	1[illegible] gal. 3rd grade	47.88	
		State Tax	42.56	
		Federal Tax	10.64	101.08
23	469	Lube Oil	2.82	2.82
26	64381	255 gal. 70-72	13.71	
		805 gal. 3rd grade	36.23	
		State Tax	42.40	
		Federal Tax	10.60	102.94
28	64485	301 gal. 70-72	16.18	
		758 gal. 3rd grade	34.11	
		State Tax	42.36	
		Federal Tax	10.59	103.24
29	64526	504 gal. 70-72	27.09	
		556 gal. 3rd grade	25.02	

Date 1988	Invoice Number			Account Debit	Credit	Balance
		State Tax	53.00			
		Federal Tax	10.60	115.71		
29	489	Lube Oil & Grease	30.19	30.19		
30	64592	255 gal. 70-72	13.71			
		805 gal. 3rd grade	36.23			
		State Tax	42.40			
		Federal Tax	10.60	102.94		
Oct. 1	64624	255 gal. 70-72	13.71			
		804 gal. 3rd grade	36.18			
		State Tax	42.36			
		Federal Tax	10.59	102.84		
3	64680	303 gal. 70-72	16.29			
		761 gal. 3rd grade	34.25			
		State Tax	42.56			
		Federal Tax	10.64	103.74		
6	64816	255 gal. 70-72	13.07			
		806 gal. 3rd grade	34.26			
		State Tax	42.44			

		Federal Tax	10.61	100.38
8	513	Lube Oil	5.64	5.64
8	64897	302 gal. 70-72	15.48	
		761 gal. 3rd grade	32.34	
		State Tax	42.52	
		Federal Tax	10.63	100.97
10	64953	508 gal. 70-72	26.04	
		561 gal. 3rd grade	23.84	
		State Tax	42.76	
		Federal Tax	10.69	103.33
12	65035	256 gal. 70-72	13.12	
		809 gal. 3rd grade	34.38	
		Federal Tax	42.60	
		State Tax	10.65	100.75
12	522	Lube Oil	5.64	5.64
13	65075	506 gal. 70-72	25.93	
		559 gal. 3rd grade	23.76	
		Federal Tax	53.25	
		State Tax	10.65	113.59

Date 1938	Invoice Number			Account Debit	Credit	Balance
15	65159	256 gal. 70-72	13.12			
		808 gal. 3rd grade	34.34			
		State Tax	42.56			
		Federal Tax	10.64	100.66		
17	66012	255 gal. 70-72	13.07			
		807 gal. 3rd grade	34.30			
		State Tax	42.48			
		Federal Tax	10.62	100.47		
Nov. 6	66824	1088 gal. 3rd grade	43.52			
		State Tax	43.52			
		Federal Tax	10.88	97.92		
8	66885	260 gal. 70-72	12.68			
		823 gal. 3rd grade	32.92			
		State Tax	43.32			
		Federal Tax	10.83	99.75		
10	66970	510 gal. 70-72	24.86			
		564 gal. 3rd grade	22.56			
		State Tax	42.96			
		Federal Tax	10.74	101.12		

Date 1938	Invoice Number			Account Debit	Credit	Balance
13	67095	512 gal. 70-72	24.96			
		565 gal. 3rd grade	22.60			
		State Tax	43.08			
		Federal Tax	10.77	101.41		
13	634	Lube Oil	31.63	31.63		
14	68248	1069 gal 3rd grade	41.42			
		State Tax	42.76			
		Federal Tax	10.69	94.87		
15	639	Lube Oil	20.72	20.72		
15	67170	567 gal. 70-72	27.64			
		514 gal. 3rd grade	20.56			
		State Tax	43.24			
		Federal Tax	10.81	102.25		
16	67208	511 gal. 70-72	24.91			
		564 gal. 3rd grade	22.56			
		State Tax	53.75			
		Federal Tax	10.75	111.97		

Date 1938	Invoice Number			Account Debit	Credit	Balance
18	646	Lube Oil	20.72	20.72		
18	67290	259 gal. 70-72	12.63			
		820 gal. 3rd grade	32.80			
		State Tax	43.16			
		Federal Tax	10.79	99.38		
19	67357	307 gal. 70-72	14.97			
		772 gal. 3rd grade	30.88			
		State Tax	43.16			
		Federal Tax	10.79	99.80		
21	68377	1069 gal. 3rd grade	41.42			
		State Tax	42.76			
		Federal Tax	10.69	94.87		
25	67536	518 gal. 70-72	25.25			
		573 gal. 3rd grade	22.92			
		State Tax	43.64			
		Federal Tax	10.91	102.72		
25	67561	1090 gal. 3rd grade	43.60			
		State Tax	43.60			

		Federal Tax	10.60	98.10
26	67586	517 gal. 70-72	25.20	
		571 gal. 3rd grade	22.84	
		State Tax	54.40	
		Federal Tax	10.88	113.32
27	67637	261 gal. 70-72	12.72	
		826 gal. 3rd grade	33.04	
		State Tax	43.48	
		Federal Tax	10.87	100.11
Dec. 1	67795	512 gal. 70-72	24.96	
		566 gal. 3rd grade	22.64	
		State Tax	43.12	
		Federal Tax	10.78	101.50
Dec. 1	685	Lube Oil	2.82	2.82
4	67884	260 gal. 70-72	12.68	
		822 gal. 3rd grade	32.88	
		State Tax	43.28	
		Federal Tax	10.82	99.66

Date 1938	Invoice Number			Account Debit	Credit	Balance
4	67911	260 gal. 70-72	12.68			
		822 gal. 3rd grade	32.88			
		State Tax	43.28			
		Federal Tax	10.82	99.66		
5	708	Lube Oil	11.28	11.28		
5	67961	259 gal. 70-72	12.63			
		819 gal. 3rd grade	32.76			
		State Tax	43.12			
		Federal Tax	10.78	99.29		
6	68666	1075 gal. 3rd grade	41.66			
		State Tax	43.00			
		Federal Tax	10.75	95.41		
8	69821	558 gal. 70-72	27.69			
		515 gal. 3rd grade	20.60			
		State Tax	54.15			
		Federal Tax	10.83	113.27		
10	69879	511 gal. 70-72	24.27			
		564 gal. 3rd grade	22.56			

		State Tax	43.00	
		Federal Tax	10.75	100.58
12	729	Lube Oil	20.35	20.35
12	69941	570 gal. 70-72	27.07	
		517 gal. 3rd grade	20.68	
		State Tax	43.48	
		Federal Tax	10.87	102.10
15	70048	261 gal. 70-72	12.40	
		825 gal. 3rd grade	33.00	
		State Tax	43.44	
		Federal Tax	10.86	99.70
16	70081	566 gal. 70-72	26.89	
		513 gal. 3rd grade	20.52	
		State Tax	53.95	
		Federal Tax	10.79	112.15
19	70158	308 gal. 70-72	14.25	
		774 gal. 3rd grade	30.96	
		State Tax	43.28	
		Federal Tax	10.82	99.31

Date 1938	Invoice Number			Account Debit	Credit	Balance
20	70194	1087 gal. 3rd grade	43.48			
		State Tax	43.48			
		Federal Tax	10.87	97.83		
23	70282	777 gal. 70-72	35.94			
		309 gal. 3rd grade	12.36			
		State Tax	43.44			
		Federal Tax	10.86	102.60		
26	70351	1088 gal. 3rd grade	43.52			
		State Tax	43.52			
		Federal Tax	10.88	97.92		
28	70423	308 gal. 70-72	14.25			
		776 gal. 3rd grade	31.04			
		State Tax	43.36			
		Federal Tax	10.84	99.49		
31	72083	568 gal. 70-72	26.27			
		515 gal. 3rd grade	20.60			
		State Tax	54.15			
		Federal Tax	10.83	111.85		

Date 1939	Invoice Number		Account Debit	Credit	Balance
Jan. 2	72127	515 gal. 70-72	23.82		
		569 gal. 3rd grade	22.76		
		State Tax	43.36		
		Federal Tax	10.84	100.78	
3	72194	1157 gal. 3rd grade	46.28		
		State Tax	46.28		
		Federal Tax	11.57	104.13	
5	775	Lube Oil	5.64	5.64	
5	72261	1160 gal. 70-72	53.65		
		State Tax	46.40		
		Federal Tax	11.60	111.65	
7	69243	1153 gal. 3rd grade	44.68		
		State Tax	46.12		
		Federal Tax	11.53	102.33	
10	71304	1078 gal. 3rd grade	37.73		
		State Tax	43.12		
		Federal Tax	10.78	91.63	

Date 1939	Invoice Number			Account Debit	Credit	Balance
12	791	Lube Oil	20.35	20.35		
12	72475	569 gal. 70-72	24.89			
		515 gal. 3rd grade	18.67			
		State Tax	54.20			
		Federal Tax	10.84	108.60		
14	72537	261 gal. 70-72	11.42			
		825 gal. 3rd grade	29.91			
		State Tax	43.44			
		Federal Tax	10.86	95.63		
15	73075	820 Dist.	32.80			
		260 Kerosene	11.05	43.85		
18	72670	517 gal. 70-72	22.62			
		571 gal. 3rd grade	20.70			
		State Tax	43.52			
		Federal Tax	10.88	97.72		
18	804	Lube Oil	20.35	20.35		
19	73267	515 gal. 70-72	22.53			

		568 gal. 3rd grade	19.88	
		State Tax	43.32	
		Federal Tax	10.83	96.56
23	72835	569 gal. 70-72	24.89	
		515 gal. 3rd grade	18.67	
		State Tax	54.20	
		Federal Tax	10.84	108.60
27	72941	570 gal. 70-72	24.94	
		516 gal. 3rd grade	18.71	
		State Tax	43.44	
		Federal Tax	10.86	97.95
28	73459	1082 gal. 3rd grade	37.87	
		State Tax	43.28	
		Federal Tax	10.82	
		Lube Oil	5.64	97.61
31	73676	567 gal. 70-72	24.81	
		514 gal. 3rd grade	18.63	
		State Tax	43.24	
		Federal Tax	10.81	97.49

Date 1939	Invoice Number			Account Debit	Credit	Balance
31	836	Lube Oil	25.99	25.99		
Feb. 2	73743	1085 gal. 3rd grade	39.33			
		State Tax	43.40			
		Federal Tax	10.85	93.58		
Feb. 4	851	Lube Oil	8.46	8.46		
4	73787	783 gal. 70-72	34.26			
		311 gal. 3rd grade	11.27			
		State Tax	54.70			
		Federal Tax	10.94	111.17		
5	73831	1162 gal. 3rd grade	42.12			
		State Tax	46.48			
		Federal Tax	11.62	100.22		
6	73855	260 gal. 70-72	11.38			
		823 gal. 3rd grade	29.83			
		State Tax	43.32			
		Federal Tax	10.83	95.36		
8	73169	1083 gal. 3rd grade	37.91			
		State Tax	43.32			

		Federal Tax	10.83	
		Lube Oil	26.70	118.76
10	74013	264 gal. 70-72	11.55	
		833 gal. 3rd grade	30.20	
		State Tax	43.88	
		Federal Tax	10.97	96.60
11	74040	263 gal. 70-72	11.51	
		830 gal. 3rd grade	30.09	
		State Tax	43.72	
		Federal Tax	10.93	96.25
13	884	Lube Oil & Grease	27.79	27.79
13	74114	1163 gal. 3rd grade	42.16	
		State Tax	46.52	
		Federal Tax	11.63	100.31
13	74133	261 gal. 70-72	11.42	
		826 gal. 3rd grade	29.94	
		State Tax	43.48	
		Federal Tax	10.87	95.71
15	74197	262 gal. 70-72	11.46	

Date 1939	Invoice Number		Account Debit	Credit	Balance
		827 gal. 3rd grade 29.98			
		State Tax 43.56			
		Federal Tax 10.89	95.89		
16	74233	1089 gal. 3rd grade 39.48			
		State Tax 43.56			
		Federal Tax 10.89	93.93		
15	889	Lube Oil 20.35	20.35		
17	74258	519 gal. 70-72 ..... 22.71			
		573 gal. 3rd grade 20.77			
		State Tax 43.68			
		Federal Tax 10.92	98.08		
20	74378	264 gal. 70-72 ..... 11.55			
		834 gal. 3rd grade 30.23			
		State Tax 43.92			
		Federal Tax 10.98	96.68		
20	895	Lube Oil 20.35	20.35		
21	75657	1083 gal. 3rd grade 37.91			
		State Tax 43.32			

		Federal Tax	10.83	92.06
22	74457	572 gal. 70-72	25.03	
		518 gal. 3rd grade	18.78	
		State Tax	54.50	
		Federal Tax	10.90	109.21
24	74531	517 gal. 70-72	22.62	
		570 gal. 3rd grade	20.66	
		State Tax	43.48	
		Federal Tax	10.87	97.63
Feb. 24	906	Lube Oil	9.88	9.88
28	74651	577 gal. 70-72	25.24	
		523 gal. 3rd grade	18.96	
		State Tax	44.00	
		Federal Tax	11.00	99.20
Mar. 2	74720	1092 gal. 3rd grade	39.62	
		State Tax	43.72	
		Federal Tax	10.93	94.27
2	923	Lube Oil	20.72	20.72

Date 1939	Invoice Number			Account Debit	Credit	Balance
5	932	Lube Oil	5.64	5.64		
4	74799	261 gal. 70-72	11.42			
		826 gal. 3rd grade	29.94			
		State Tax	43.48			
		Federal Tax	10.87	95.71		
5	74834	309 gal. 70-72	13.52			
		777 gal. 3rd grade	28.17			
		State Tax	43.44			
		Federal Tax	10.86	95.99		
6	74862	1086 gal. 3rd grade	39.37			
		State Tax	43.44			
		Federal Tax	10.86	93.67		
8	74959	259 gal. 7072	11.33			
		818 gal. 3rd grade	29.65			
		State Tax	43.08			
		Federal Tax	10.77	94.83		
9	74984	259 gal. 70-72	11.33			
		819 gal. 3rd grade	26.69			

		State Tax	43.12	
		Federal Tax	10.78	94.92
9	944	Lube Oil	14.81	14.81
11	75051	1078 gal. 3rd grade	39.08	
		State Tax	43.12	
		Federal Tax	10.78	92.98
12	76054	1069 gal. 3rd grade	37.42	
		55 Naphtha	3.85	
		State Tax on gas	42.76	
		Federal Tax	11.24	95.27
13	75130	259 gal. 70-72	11.33	
		819 gal. 3rd grade	29.69	
		State Tax	43.12	
		Federal Tax	10.78	94.92
15	75203	260 gal. 70-72	11.70	
		822 gal. 3rd grade	30.83	
		State Tax	43.28	
		Federal Tax	10.82	96.63

Date 1939	Invoice Number			Account Debit	Credit	Balance
16	977	Lube Oil	43.97	43.97		
16	75265	1079 gal. 3rd grade	40.46			
		State Tax	43.16			
		Federal Tax	10.79	94.41		
16	75273	260 gal. 70-72	11.70			
		821 gal. 3rd grade	30.79			
		State Tax	43.24			
		Federal Tax	10.81	96.54		
Mar. 17	75281	1157 gal. 3rd grade	59.30			
		State Tax	46.28			
		Federal Tax	11.57	117.15		
17	75304	773 gal. 70-72	34.79			
		307 gal. 3rd grade	11.51			
		State Tax	54.00			
		Federal Tax	10.80	111.10		
19	76221	1069 gal. 3rd grade	38.75			
		State Tax	42.76			
		Federal Tax	10.69	92.20		

20	77209	1152 gal. 3rd grade	59.04	
		State Tax	46.08	
		Federal Tax	11.52	116.64
20	77214	511 gal. 70-72	23.00	
		564 gal. 3rd grade	21.15	
		State Tax	43.00	
		Federal Tax	10.75	97.90
21	77260	1150 3rd grade	58.94	
		State Tax	46.00	
		Federal Tax	11.50	11.50
23	76317	10 gal. 70-72	1.10	
		State Tax	.40	
		Federal Tax	.10	
		1069 Diesel Fuel	40.09	41.69
25	1003	Lube Oil	29.13	29.13
25	77432	508 gal. 70-72	22.86	
		561 gal. 3rd grade	21.74	
		State Tax	42.76	
		Federal Tax	10.69	98.05

Date 1939	Invoice Number			Account Debit	Credit	Balance
28	77533	826 gal. 70-72	38.20			
		261 gal. 3rd grade	10.11			
		State Tax	43.48			
		Federal Tax	10.87	102.66		
30	77607	1085 gal. 3rd grade	42.01			
		State Tax	43.40			
		Federal Tax	10.85	96.29		
31	77641	1156 gal. 3rd grade	60.69			
		State Tax	46.24			
		Federal Tax	11.56	118.49		
30	1014	Lube Oil	19.25	19.25		
Apr. 3	1029	Lube Oil	19.25	19.25		
3	77738	1073 gal. 3rd grade	41.58			
		State Tax	42.92			
		Federal Tax	10.73	95.23		
4	1039	Lube Oil	14.10	14.10		
4	77776	1074 gal. 3rd grade	41.62			

		State Tax	42.96	
		Federal Tax	10.74	95.32
7	77865	516 gal. 70-72	23.87	
		570 gal. 3rd grade	22.09	
		State Tax	43.44	
		Federal Tax	10.86	100.26
10	77956	1075 gal. 3rd grade	41.66	
		State Tax	43.00	
		Federal Tax	10.75	95.41
10	1059	Lube Oil	18.90	18.90
Apr. 11	7661	10 gal. 70-72	1.20	
		State Tax	.40	
		Federal Tax	.10	
		1069 gal. Diesel Fuel	40.09	41.79
12	78045	308 gal. 70-72	14.25	
		774 gal. 3rd grade	29.99	
		State Tax	43.28	
		Federal Tax	10.82	98.34

Date 1939	Invoice Number			Account Debit	Credit	Balance
12	1069	Lube Oil	19.43	19.43		
13	78096	512 gal. 70-72	23.68			
		566 gal. 3rd grade	21.93			
		State Tax	43.12			
		Federal Tax	10.78	99.51		
14	78119	1075 gal. 3rd grade	41.66			
		State Tax	43.00			
		Federal Tax	10.75	95.41		
13	1071	Lube Oil	38.85	38.85		
14	1073	Lube Oil	47.85	47.85		
1938						
Dec. 13	CV-12-11	Loss on Truck for Mo.	4.40	4.40		
Payments						
1938						
June 27	Cr 6-282				251.00	
July 6	Cr 7-46				450.00	

7	Cr	7-55	350.00
8	Cr	7-75	250.00
11	Cr	7-94	554.24
16	Cr	7-154	1,000.00
16	Cr	7-168	600.00
18	Cr	7-175	300.00
21	Cr	7-233	300.00
25	Cr	7-262	200.00
27	Cr	7-283	500.00
30	Cr	7-317	502.67
Aug. 4	Cr	8-43	1,000.00
8	Cr	8-67	300.00
13	Cr	8-122	300.00
15	Cr	8-134	300.00
17	Cr	8-163	32.89
19	Cr	8-180	100.00
20	Cr	8-188	300.00
23	Cr	8-218	200.00
30	Cr	8-293	500.00
Sept. 7	Cr	9-58	200.00
10	Cr	9-94	200.00
15	Cr	9-146	300.00

Date 1939	Invoice Number	Account Debit	Account Credit	Balance
16	Cr 9-156		197.28	
19	Cr 9-189		500.00	
22	Cr 9-228		400.00	
27	Cr 9-273		600.00	
30	Cr 9-310		300.00	
Oct. 5	Cr 10-41		300.00	
11	Cr 10-87		300.00	
18	Cr 10-93		300.00	
18	Cr 10-93		161.27	
18	Cr 10-93		4.45	
25	Cr 10-99		400.00	
Oct. 29	Cr 10-103		500.00	
Nov. 1	Cr 11-1		300.00	
6	Cr 11-6		300.00	
9	Cr 11-8		300.00	
17	Cr 11-15		15.47	
19	Cr 11-17		500.00	
26	Cr 11-22		500.00	
27	Cr 11-24		300.00	
Dec. 6	67975		83.98	
16	Cr 12-14		500.00	

20	Cr 12-17			400.00	
28	Cr 12-23			400.00	
1939					
Jan. 4	Cr 1-2			300.00	
13	Cr 1-10			300.00	
17	Cr 1-13			200.00	
23	Cr 1-18			200.00	
27	Cr 1-22			300.00	
Feb. 1	Cr 2-1			200.00	
7	Cr 2-6			300.00	
7	Cr 2-6			5.08	
14	Cr 2-12			400.00	
20	Cr 2-17			200.00	
24	Cr 2-21			200.00	
27	Cr 2-23			200.00	
Mar. 15	Cr 3-13			200.00	
17	Cr 3-15			300.00	
20	Cr 3-17			300.00	
28	Cr 3-24			300.00	
Apr. 11	Cr 4-9			200.00	
13	Cr 4-11	Earnings on Truck		17.91	
	Totals		26,066.66	20,676.24	5,390.42

State of Texas,
County of Potter.

Before me, the undersigned authority, on this day personally appeared Ray Woolf, who first being placed under oath deposes and says, that he is an agent of The Shamrock Oil and Gas Corporation and that he holds the office of Credit Manager for said company and that the above and foregoing cause of action and account in favor of The Shamrock Oil and Gas Corporation and against G. Obie Sheets and Chester Sheets forming the partnership of and doing business as Friona Independent Oil
22 Company, is within the knowledge of affiant just and true, and that it is due and that all just and lawful offsets, payments and credits have been allowed.

RAY WOOLF.

Subscribed And Sworn to before me this 11 day of May, 1939.

MARGUERITE SEOGGAN,
(Seal) Notary Public, Potter County, Texas.

Indorsements: No. 14531, No. 1159, The Shamrock Oil & Gas Corporation vs. G. Obie Sheets et al.

Filed: 5-11-39 Ben Smith, District Clerk, Potter Co., Texas.

Filed: 7-1-39 E. V. Rushing, District Clerk, Parmer County, Texas.

23 DEFENDANT'S PLEA OF PRIVILEGE.

Filed 6-24-39, 7-1-39.

In the District Court, 108th Judicial District, Potter County, Texas.

The Shamrock Oil & Gas Corporation,
vs. No. 14531.
G. Obie Sheets, et al.

To the Honorable W. E. Gee, Judge of said Court:

Now comes G. Obie Sheets and Chester Sheets, defendants in the above entitled and numbered cause, having been heretofore served with citation to appear herein, and file this their plea of privilege, showing to the Court as grounds therefor the following:

1. These defendants, the parties claiming such privilege, were not at the institution of such suit, nor at the time of the service of process thereon, nor were, nor are, they at the time of the filing of such plea, residents of Potter County, Texas, the County in which such suit was instituted.

2. The county of the residence of these defendants at the time of such plea, including the time of the filing of same, is Parmer County, Texas.

3. No exception to exclusive venue in the county of one's residence, provided by law, exists in said cause.

Wherefore, premises considered, these defendants pray the Court to sustain this plea of privilege.

G. OBIE SHEETS and CHESTER SHEETS,
Defendants.
MONNING & SINGLETON,
Their Attorneys.
BEN P. MONNING.

The State of Texas,
County of Potter.

Before Me, the undersigned authority, on this day personally appeared Ben P. Monning, who, on oath stated that he is one of the attorneys, of record for the defendants in the above mentioned cause and that the foregoing plea and every statement and allegation thereof are true.

BEN P. MONNING.

24 Subscribed And Sworn To, before me, by the said Ben P. Monning, this the 23rd day of June A. D. 1939, to certify which witness my hand and seal of office.

MRS. J. E. BROWNING,
A Notary Public in and for
(Seal) Potter County, Texas.

Indorsements: No. 14531, No. 1159, The Shamrock Oil & Gas Corporation vs. G. Obie Sheets, et al.

Filed: 6-24-39; Ben Smith, District Clerk, Potter County, Texas.

Filed: 7-1-39; E. V. Rushing, Clerk, District Court Parmer County, Texas.

CERTIFIED COPY OF ORDER SUSTAINING PLEA OF PRIVILEGE.

Filed 7-1-39.

In the District Court of Potter County, Texas, 108th Judicial District.

The Shamrock Oil and Gas Corporation,
vs. No. 14531.
G. Obie Sheets, et al.

On this the 29th day of June, 1939, in the above entitled and numbered cause, came on to be heard the Plea of

Privilege of G. Obie Sheets and Chester Sheets in the above cause and came the plaintiff, by its attorney, and announced that it would not controvert such Plea of Privilege of the said G. Obie Sheets and Chester Sheets to be sued in Parmer County, the County of said defendant's residence, and the Court, having considered such Plea of Privilege, together with the evidence offered, is of the opinion that the Plea of Privilege should be sustained.

It Is Accordingly Ordered, Adjudged And Decreed that such Plea of Privilege is sustained, that the venue of said cause is changed, and that said cause should be transferred to the District Court of Parmer County, Texas, the proper Court of the County having jurisdiction of the parties to such cause, of the person of the defendants, G. Obie Sheets and Chester Sheets, and of such cause; and the Clerk of this Court is ordered to make up a transcript of all of the orders in said cause, certifying thereto officially under the seal of this Court, and transmit the same, together with the original papers in said cause, to the Clerk of the said District Court of Parmer County, Texas, and that the plaintiff pay the costs incurred in this cause prior to the time same is filed in the said District Court of Parmer County, Texas, for which let execution issue.

(Signed) W. E. GEE,
District Judge.

The State of Texas,
County of Potter.

I, Ben Smith, Clerk of the District Courts of Potter County, Texas, do hereby certify that the above and foregoing is a true and correct copy of the Order Sustaining Plea of Privilege in Cause No. 14531 wherein The Shamrock Oil & Gas Corporation is plaintiff and G. Obie Sheets, et al are defendants, as the same appears of record in my office in Civil Minute Book No. 22 at page 527, and is a complete transcript of all orders entered in said cause.

Given Under My Hand And The Seal Of Said Court at my office in Amarillo, Texas, this the 30th day of June, A. D. 1939.

BEN SMITH,
(Seal) Clerk District Courts, Potter County, Texas.
By RUTH ROBINSON,
Deputy.

Indorsements: No. 1159, The Shamrock Oil & Gas Corporation vs. G. Obie Sheets et al.

Filed: 7-1-39; E. V. Rushing, Clerk of the District Court Parmer County, Texas.

26 DEFENDANT'S ORIGINAL ANSWER.

Filed 7-7-39.

In the District Court of Parmer County, Texas.

The Shamrock Oil & Gas Corporation,
vs. No. 1159.
G. Obie Sheets, et al.

To Said Honorable Court:

Now come G. Obie Sheets and Chester Sheets, defendants in the above entitled and numbered cause, and file this their Original Answer to Plaintiff's Original Petition filed herein, and for said answer say:

I.

This defendants except and demur generally to plaintiff's said petition and say that the same is not sufficient

in law to require them to answer, states no cause of action against them, or either of them, and should be dismissed, and of this they pray judgment of the Court.

II.

And, for answer herein, if such be necessary, without waiving their general demurrer but still insisting upon the same, these defendants deny each and every allegation in plaintiff's said petition contained and say that the same is not true in whole or in part and demand strict proof of the same, and of this they put themselves upon the country.

III.

That on or about the 1st day of February, 1937, and anterior to the dates of the shipments of gasoline set forth in plaintiff's petition, Plaintiff entered into an agreement with the defendants, and each of them, whereby defendants agreed to be bound by the price at which they in turn were to sell the gasoline to the consuming public, at retail, and further agreed to handle the plaintiff's gasoline exclusively; plaintiff agreed with defendants in conspiracy against trade in violation of Article 7428 of the Revised Civil Statutes of the State of Texas, whereby the defendants became bound to sell the gasoline
27 product of plaintiff exclusively; and defendants further agreed and were caused to agree to refuse to buy any other gasoline or to sell any other gasoline out of their pumps other than the gasoline of plaintiff, and all of which agreements amounted to a conspiracy against trade, and the sales referred to in plaintiff's petition were sales in a continuation and carrying out of said contract of conspiracy against trade, which was in all things illegal and void.

Wherefore, defendants pray that they go hence with their costs, without day, and that plaintiff take nothing.

IV.

On or about the 1st day of February, 1937, and on numerous occasions since said date, plaintiff required defendants to again agree with it with reference to the retail price of gasoline, and by which agreement defendants agreed to be guided by plaintiff's designated price, and that such contract for sale of gasoline was in violation of the anti-trust statutes and was a conspiracy against trade, and the contract of sale of gasoline to defendants was one whereby defendants agreed to allow plaintiff to fix the amounts increase or reduce the price of the merchandise and was designed to fix a standard price, which is in restraint of trade and in contravention with the anti-trust statutes, Art. 7426, et seq. of the Revised Civil Statutes of the State of Texas, and that the purchase and account complained of in plaintiff's petition were articles passing from plaintiff to defendants under the terms of said illegal contract in restraint of trade and in violation of the anti-trust statutes, and that such contract was illegal and void.

Wherefore, defendants pray that they go hence with their costs, without day, and that plaintiff take nothing.

V.

On or about the 1st day of February, 1937, and at various dates anterior to such time, plaintiff directed the defendants, and each of them, to comply with the regulated major oil companies' price for gasoline and to fluctuate their price such that the price of gasoline should never be under the quoted major oil companies' price at any time; that the defendants, and each of them, were required to comply with plaintiff's demands, and so set their retail price in conformity with plain-

tiff's demands, such that the price of gasoline supplied by plaintiff to defendants was to be equal with the major oil companies' price, and in furtherance of a monopoly, as such term is defined in Art. 7227 of the Revised Civil Statutes of the State of Texas, and which contract, by reason of being a mon*o*p*ly* and in furtherance of a mo*n*op*ly*, was illegal and void. That the items listed in plaintiff's claim were a result of said illegal contract and in pursuance thereof, and were an intrical part of the furtherance of a monopoly, and that said contract for the purchase therefor was illegal and void.

Wherefore, defendants pray that they go hence with their costs, without day, and that the plaintiff take nothing.

VI.

And, by way of cross-action and as an off-set defendants and cross plaintiffs further say:

On or about the 1st day of February, 1939, plaintiff entered into an agreement with the defendants, and each of them, whereby the defendants were to purchase newer and improved equipment for the transportation of gasoline, and were, in turn, to lease said truck by hauling Shamrock gasoline from Shamrock plants to the various retail establishments created by the plaintiff herein, and were to use said truck and to have the depreciation, up-keep, and cost of operation of said truck paid by the plaintiff and to continue the operation of hauling for plaintiff herein until the sum of $5,000.00 was earned by the defendants from the operation of said truck in the transportation of gasoline, to be used as an off-set to defendant's account; that immediately thereafter, to induce the defendants, and each of them to expend their funds for such gasoline truck and transportation equipment, and to cause them to enter into such contract with plaintiff for hauling of such gaso-

line, plaintiff agreed to allow defendants to con-
29 tinue to operate at least one truck in such manner, whereby plaintiff was obligated to pay the salary of the driver, the cost of operation, depreciation, and up-keep and to yield a sum of approximately $300.00 monthly to the defendants, and that said contract should continue indefinitely, as long as defendants desired to continue making said hauls; that although defendants placed themselves in a position to make such hauls and commenced making such hauls, soon thereafter plaintiff refused to allow defendants to haul its gasoline, and soon thereafter concluded its sale of gasoline to these defendants.

Wherefore, defendants, and each of them, have been damaged in the sum of $5,000.00, which should be allowed as an off-set to any claim which plaintiff may have herein, and in the further sum of $2,200.00, for which defendants pray by way of cross-action against the plaintiff herein.

Wherefore, premises considered, defendants pray judgment of the Court, that on final hearing hereof plaintiff take nothing and that they go hence without day, with their cost, and that they have judgment against the said plaintiff on their cross-action for $7200.00, and for all costs of suit, and such other and further relief, special and general, in law and in equity, to which they may be justly entitled.

MONNING & SINGLETON,
Attorneys for Defendants.

Indorsements: No. 1159, The Shamrock Oil & Gas Corporation vs. G. Obie Sheets, et al.

Filed: 7-7-39: E. V. Rushing, District Clerk, Parmer County, Texas.

PETITION FOR REMOVAL OF CAUSE TO UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, AMARILLO DIVISION.

30 Filed 7-10-39.

In the District Court of Parmer County, Texas.

The Shamrock Oil and Gas Corporation,
vs. No. 1159.
G. Obie Sheets and Chester Sheets.

To the District Court for the 68th Judicial District of Texas, for the County of Parmer, Texas:

The petition of The Shamrock Oil and Gas Corporation, defendant in the cross action of G. Obie Sheets and Chester Sheets in the above entitled cause respectfully shows to this Court that in the above entitled and numbered cause G. Obie Sheets and Chester Sheets have brought a cross action against The Shamrock Oil and Gas Corporation, and that such cross action is a suit in which The Shamrock Oil and Gas Corporation is defendant, and that said suit is now pending herein, and that said cross action presents an action entirely separate, segregated and not related to the action or claims made in the action filed by The Shamrock Oil and Gas Corporation against the said G. Obie Sheets and Chester Sheets.

That said cross action is a suit or action of a civil nature at law, and is brought to recover the sum of Seven Thousand Two Hundred Dollars ($7,200.00) damages against the defendant in the cross action, The Shamrock Oil and Gas Corporation.

The cross action of the said G. Obie Sheets and Chester Sheets in the above entitled action involves a controversy which is wholly between citizens of different states, in

that G. Obie Sheets and Chester Sheets, the plaintiffs in the cross action, were at the time of the commencement of said suit in this Court, and at the time of filing such cross action, and still are citizens of the State of
31 Texas, residing in the County of Parmer in said State; and that your petitioner, The Shamrock Oil and Gas Corporation, the defendant in said suit of cross action, was at the time of the commencement of said suit, and still is, a corporation duly created and existing under and by virtue of the laws of the State of Delaware, and is a resident and citizen of the State of Delaware, but maintaining an office and place of business in Amarillo, Potter County, Texas, in the Northern District of Texas.

That said suit on cross action is one of which the District Courts of the United States are given original jurisdiction.

The time within which your petitioner is required by the laws of this State and the rules of this Court to answer or plead to the cross action of the said G. Obie Sheets and Chester Sheets in the above entitled action has not yet expired.

The value of the matter in controversy in said action exceeds Three Thousand Dollars ($3,000.00), exclusive of interest and costs, as appears from the allegations of the cross action.

Petitioner presents herewith a bond with good and sufficient surety, conditioned that it will enter into the District Court of the United States for the Northern District of Texas, Amarillo Division, within thirty (30) days from the date of filing of this petition, a certified copy of the record in this suit, and that it will pay all costs that may be awarded by the said District Court in case the said Court shall hold that this suit was wrongfully or improperly removed thereto.

Prior to the filing of this petition and of said bond for the removal of this cause, written notice of intention to file same was given by petitioner to the plaintiffs in such cross action as required by law, a true copy of which, with proof of service of same, is attached hereto.

Wherefore, your petitioner prays that this Court proceed no further herein except to make an order of removal as required by law and to accept said surety and bond, and to cause the record herein to be removed into said District Court of the United States within
32 and for the Northern District of Texas, Amarillo Division, according to the statutes in such cases made and provided.

Dated July 10th, 1939.

UNDERWOOD, JOHNSON,
DOOLEY & WILSON,
By W. M. SUTTON,
Attorneys for Petitioner The Shamrock Oil and Gas Corporation.

PETITION FOR REMOVAL OF CAUSE TO UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, AMARILLO DIVISION.

Filed 7-10-39.

State of Texas,
County of Potter.

J. H. Dunn, being duly sworn deposes and says:

That he is Vice-President and General Manager of The Shamrock Oil and Gas Corporation, and that he is auth-

orized to make this affidavit for and on behalf of The Shamrock Oil and Gas Corporation, and that he has read the above and foregoing petition and is familiar with all matters of fact therein alleged and set forth, and that all of such matters, facts and things therein alleged and set out are within the knowledge of the affiant true and correct, except as to such matters alleged upon information and belief, and affiant states that said matters, facts and things so alleged upon information and belief are within the belief of affiant true and correct.

J. H. DUNN.

Sworn To And Subscribed before me, the undersigned authority, this the 10th day of July, 1939.

MARGUERITE SCOGGAN,
(Seal) Notary Public, Potter County, Texas.

PETITION FOR REMOVAL OF CAUSE TO UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, AMARILLO DIVISION.

33 Filed 7-10-39.

In the District Court of Parmer County, Texas.

The Shammock Oil and Gas Corporation,
vs. No. 1159.
G. Obie Sheets and Chester Sheets.

To G. Obie Sheets and Chester Sheets, Plaintiffs in Cross Action in above Entitled Cause, and their Attorneys, Monning and Singleton:

Please take notice that The Shamrock Oil and Gas Corporation, the defendant in the cross action is the above entitled cause, will, on the 10th day of July, 1939, at one

o'clock in the afternoon of that day, file in the District Court of the State of Texas, for the County of Parmer in said State, and in the Clerk's office thereof in which said suit is now pending, its petition and bond for the removal of the said Cause from the said District Court of Parmer County, Texas, to the District Court of the United States for the Northern District of Texas, Amarillo Division, and that on the 10th day of July, 1939, at one o'clock in the afternoon of that day or as soon thereafter as counsel may be hear, said petition and bond will be called up for hearing and disposed of before the Court in which this action is pending, at which time and place you may be present if you so elect copies of said petition are served herewith.

Dated this the 10th day of July, 1939.

THE SHAMROCK OIL AND GAS CORPORATION,
By UNDERWOOD, JOHNSON, DOOLEY & WILSON,
Its Attorneys.

Service of the above notice and receipt of copy thereof and copy of the removal petition and bond attached is acknowledged to have been made on the undersigned attorneys for G. Obie Sheets and Chester Sheets, plaintiffs in cross action, on the 10th day of July, 1939, and before the hearing above stated.

MONNING & SINGLETON,
E. BYRON SINGLETON,
Attorneys for Plaintiffs.

Indorsements: No. 1159, The Shamrock Oil and Gas Corporation vs. G. Obie Sheets and Chester Sheets.

Filed: 7-10-39, E. V. Rushing, District Court, Parmer County, Texas.

34 BOND.

Filed 7-10-39.

In the District Court of Parmer County, Texas.

The Shamrock Oil and Gas Corporation,
vs. No. 1159.
G. Obie Sheets and Chester Sheets.

Know All Men By These Presents: That, we, The Shamrock Oil and Gas Corporation, as principal, and American Surety Company of New York, as Surety, are held and firmly bound unto G. Obie Sheets and Chester Sheets, the plaintiffs in the cross action against The Shamrock Oil and Gas Corporation in the above entitled and numbered cause, their successors and assigns, in the penal sum of Five Hundred Dollars ($500.00) lawful money of the United States of American for the payment of which well and truly to be made we and each of us bind ourselves, our successors and assigns, jointly and severally by these presents.

The conditions of this obligations are that whereas, the said The Shamrock Oil and Gas Corporation has applied by petition to the District Court of the County of Parmer and State of Texas for the removal of the above entitled cause from the said District Court of Parmer County, Texas, to the District Court of the United States for the Northern District of Texas, Amarillo Division;

Now, if the said The Shamrock Oil and Gas Corporation shall enter, in the said District Court of the United States for the Northern District of Texas, Amarillo Division, within thirty (30) days from the date of filing of the petition for such removal a certified copy of the record in said suit, and shall well and truly pay all costs that may

be awarded by said District Court if it shall hold that said suit was wrongfully or improperly removed thereto, then this obligation is to be void, otherwise to remain in full force and effect.

THE SHAMROCK OIL AND GAS CORPORATION,
By J. H. DUNN,
Its Vice President and General Manager, Principal.

AMERICAN SURETY COMPANY OF NEW YORK,
By HENRY THOMAS,
Its Attorney-in-fact, Surety.

(Corp. Seal)

Approved and Accepted this 10th day of July, 1939.

REESE TATUM,
Judge of the District Court of Parmer County, Texas.

Indorsements: No. 1159; The Shamrock Oil and Gas Corporation vs. G. Obie Sheets and Chester Sheets.

Filed: 7-10-39; E. V. Rushing, Clerk of the District Court, Parmer County, Texas.

ORDER REMOVING CASE TO FEDERAL COURT.

Filed 7-10-39.

In the District Court of Parmer County, Texas.

The Shamrock Oil and Gas Corporation,
vs. No. 1159.
G. Obie Sheets and Chester Sheets.

On this the 10th day of July, 1939, The Shamrock Oil and Gas Corporation, defendant in the cross action in the above cause, through its attorneys, presented herein its petition for removal of this cause to the District Court of the

United States for the Northern District of Texas, Amarillo Division, and also presented its bond conditioned as provided by law, and likewise presented due proof of service of written notice of said petition and bond for removal on which, It Is, Therefore, Ordered, Adjudged And Decreed by the Court that the said petition and bond be filed, as now done, and that said bond be and the same is hereby accepted and approved, and that this Court proceed no further herein, said cause being removed to the District Court of the United States for the Northern District of Texas Amarillo Division thereof, by virtue of said petition and bond, and that the Clerk of this Court prepare proper removal transcript herein as provided by law.

REESE TATUM,
Judge of the District Court,
Parmer County, Texas, 68th
Judicial District of Texas.

36 Indorsements: No. 1159, The Shamrock Oil and Gas Corporation vs. G. Obie Sheets et al.

Filed: 7-10-39, E. V. Rushing, District Clerk, Parmer County, Texas.

DEFENDANT'S MOTION TO REMAND CAUSE.

37 Filed Aug. 9, 1939.

In the District Court of the United States for the Northern District of Texas, Amarillo Division.

The Shamrock Oil and Gas Corporation,
vs. No. 73 Civil Action.
G. Obie Sheets and Chester Sheets.

To the Honorable James C. Wilson, United States District Judge:

Now come G. Obie Sheets and Chester Sheets, defendants in the original cause of action and cross plaintiffs, and

move the Court to remand the above entitled cause to the State Court from whence it was removed for trial, for the following reasons:

I.

The original suit was instituted by the Shamrock Oil and Gas Corporation as plaintiff against G. Obie Sheets and Chester Sheets as defendants, and the original suit filed on behalf of The Shamrock Oil and Gas Corporation prayed for a judgment in the sum of $5,390.42, and being a sum in excess of $3,000.00. The Shamrock Oil and Gas Corporation had its election prior to filing the original suit, and although the original claim was in an amount in excess of $3,000.00 and a diversity of citizenship appeared, the Shamrock Oil and Gas Corporation elected the forum of the State Court by instituting such proceedings in the District Court of Potter County, Texas, and The Shamrock Oil and Gas Corporation is bound by its election to try the cause in the forum of the State District Court.

II.

The Shamrock Oil and Gas Corporation is not an original defendant and relies in its petition for removal
38 of this cause upon a cross-action wherein it is cross defendant. The Shamrock Oil and Gas Corporation is not such a defendant as is entitled to remove this cause from the State Court.

III.

There is involved in this cross-action no separable controversy and the basis of the cross-action grew out of and is dependent upon the allegations contained in The Shamrock Oil and Gas Corporation's original petition, and the identical defendants in the main suit are the cross-plaintiffs against the identical plaintiff.

IV.

The cross-petition, wherein The Shamrock Oil and Gas Corporation is cross-defendant, is not such an action in which the District Courts of the United States are given original jurisdiction; the cross-action is a suit or action of a civil nature at law, brought to recover the sum of $2,200.00 damages against the cross-defendant in the cross-action The Shamrock Oil and Gas Corporation, and is further brought by way of set-off for the sum of $5,000.00 and is urged defensively as a set-off in the sum of $5,000.00, and does not pray for affirmative relief in a sum in excess of $3,000.00.

V.

All of the facts alleged herein are apparent in the record in said cause, which said record evidences:

(a) The Shamrock Oil and Gas Corporation filed its suit in the 108th Judicial District Court of Potter County, Texas, being Cause No. 14,531, complaining of G. Obie Sheets and Chester Sheets, forming the partnership and doing business as and in the name of Friona Independent Oil Company, and presented its claim upon a verified itemized statement of account, praying judgment against the defendants in the sum of $5,390.42;

(b) Defendants G. Obie Sheets and Chester Sheets filed their plea of privilege under Article 1995 of the
39 1925 Revised Civil Statutes of the State of Texas, praying that said cause be transferred to Parmer County, Texas, the place of their residence, and upon this plea of privilege the cause was transferred to Parmer County, Texas;

(c) G. Obie Sheets and Chester Sheets filed their original answer in the District Court of Parmer County,

Texas, urging general and specific denials and by way of cross-action and as an off-set G. Obie Sheets and Chester Sheets complained of the original plaintiff the Shamrock Oil and Gas Corporation and prayed for an allowance of $5,000.00 as a set-off to any claim which it may have, and prayed affirmatively for the further sum of $2,200.00 by way of cross-action against The Shamrock Oil and Gas Corporation;

(d) The Shamrock Oil and Gas Corporation filed its petition for removal of the cause to the United States District Court for the Northern District of Texas, Amarillo Division, upon the allegations:

1. Said Cross-action presents an action entirely separate, segregated and not related to the action or claims made in the action filed by The Shamrock Oil and Gas Corporation;

2. Said cross-action is brought to recover the sum of $7,200.00 damages;

3. Diversity of citizenship;

4. Said suit on cross-action is one in which the District Court of the United States is given original jurisdiction;

5. The petition was filed in time required by law;

6. The value of the matter in controversy exceeds $3,000.00;

40 7. The required bond submitted; and,

8. Notice given to adverse counsel;

and come now your movants G. Obie Sheets and Chester Sheets and deny paragraphs 1, 2, 4 and 6, and admit the allegations in paragraphs 3, 5, 7 and 8.

Wherefore your movants G. Obie Sheets and Chester Sheets, cross-plaintiffs and original defendants herein, say this Court has no jurisdiction to try and determine this cause, and pray that same be remanded to the 69th Judicial District Court, Parmer County, Texas, from whence it came.

E. BYRON SINGLETON,
Of Counsel.
MONNING & SINGLETON,
Attorneys for G. Obie Sheets and Chester Sheets.

1014 Fisk Building,
Amarillo, Texas.

ORDER OVERRULING MOTION TO REMAND.

41 Filed Sept. 25, 1939.

(Title Omitted.)

On this the 25th day of September, 1939, came on to be considered the motion of G. Obie Sheets and Chester Sheets to remand this cause to the District Court of the State of Texas for Parmer County, and came the plaintiffs in the cross action, G. Obie Sheets and Chester Sheets, by their attorneys, and came the defendant in the cross action, The Shamrock Oil and Gas Corporation, by its attorneys, and announced upon said motion, and after hearing said motion, argument of counsel, and due consideration thereof, the Court is of the opinion and finds that said motion to remand should be overruled.

Therefore, it is Ordered, Adjudged and Decreed that the motion of G. Obie Sheets and Chester Sheets to remand this cause to the District Court of the State of Texas for

Parmer County be, and the same is hereby, overruled and refused for each and all of the reasons assigned in opinion rendered in open Court this the 25th day of September, 1939, which opinion is filed herein, to all of which action and ruling of the Court the plaintiffs in cross action, G. Obie Sheets and Chester Sheets, excepted.

JAMES C. WILSON,
District Judge.

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42 JUDGMENT.

Filed Oct. 13, 1939.

In the United States District Court for the Northern District of Texas, Amarillo Division.

The Shamrock Oil and Gas Corporation, Complainant,
vs.
G. Obie Sheets, et al., Defendants.

Civil Action Number 73.

Be It Remembered that upon the 11th day of October, 1939, the above case came on for trial, whereupon came the complainant and announced ready, and came the defendants and announced ready upon complainant's action and further announced ready upon defendants' cross-action and counterclaim, whereupon complainant announced ready upon the cross-action and counterclaim of defendants, a jury was thereupon selected composed of E. C. Eubanks and eleven others, whereupon the evidence of respective parties was introduced and at the conclusion of the evidence the complainant, The Shamrock Oil and Gas Corporation, made a motion for an instructed verdict in its favor upon its claim and the cross-action and counterclaim of the defendants, the Court being of the opinion

that under the evidence introduced upon the trial of this cause that the plaintiff was entitled to an instructed verdict upon the cross-action and counterclaim of the defendants and was further of the opinion that there should be submitted to the jury one issue of fact raised by the pleadings and evidence, whereupon, after argument of counsel for respective parties to the jury, the Court submitted in its charge to the jury the following issue:

43 "Did the parties to this suit, in the contract, out of which the account in question resulted, agree that the defendants were to sell the products plaintiff sold to them only at those prices at which the major oil companies sold like products in Friona, Texas?"

Whereupon the jury retired to deliberate and consider its answer to such issue and thereafter on the 13th day of October, 1939, returned in open Court their answer to such issue as follows:

"We, the jury, answer No.

E. C. EUBANKS, Foreman."

Whereupon the Court instructed the jury to return its verdict for the plaintiff upon the plaintiff's claim and upon the cross-action and counterclaim of the defendant and, pursuant to the instructions of the Court, the jury returned the following verdict:

"We, the jury, find for the plaintiff, The Shamrock Oil and Gas Corporation, against the defendants, G. Obie Sheets and Chester Sheets, doing business as and in the name of Friona Independent Oil Company, on the plaintiff's claim for the sum of $5,390.42 with interest at the rate of 6% per annum from May 14, 1939.

We, the jury, find for the plaintiff, The Shamrock Oil and Gas Corporation, on the cross-action and counterclaim of defendants.

E. C. EUBANKS, Foreman."

Therefore, it is Ordered, Adjudged and Decreed that the plaintiff, The Shamrock Oil and Gas Corporation, to have and recover judgment of and against the defendants, G. Obie Sheets and Chester Sheets, jointly and severally, and as partners, doing business as and in the name of Friona Independent Oil Company, for the amount of $5,390.42, with interest at the rate of 6% per annum from the 14th day of May, 1939, to this date, in the total sum of $5,524.28, and that this judgment shall bear interest from this date at the rate of 6% per annum.

44 It is Further Ordered, Adjudged and Decreed that the defendants take nothing by their cross-action and counterclaim against the plaintiff.

It is Further Ordered, Adjudged and Decreed that all costs incurred herein are taxed against the defendants, G. Obie Sheets and Chester Sheets, for all of which let execution issue.

To which action and ruling of the Court the defendants in open Court duly excepted.

Done this the 13th day of October, 1939.

JAMES C. WILSON,
United States District Judge.

DEFENDANTS' MOTION FOR NEW TRIAL AND FOR RECONSIDERATION OF THEIR MOTION TO REMAND.

45 Filed Oct. 23, 1940.

(Title Omitted.)

To Shamrock Oil & Gas Corporation, Plaintiff in the above entitled and numbered cause, to Underwood, Johnson, Dooley & Wilson, Amarillo Building, Amarillo, Texas, and to William Sutton, Attorneys for said Plaintiff:

Please Take Notice:

That on this the 23rd day of October, 1939, a motion for a new trial and a motion for a reconsideration of the Court's order overruling defendants' motion to remand has been filed, upon all of the record in this cause, and that the undersigned will move, at Amarillo, Texas, for a new trial of this action on the grounds set forth in the accompanying motions.

Dated this the 23rd day of October, A. D. 1939.

MONNING & SINGLETON,
Attorneys for Defendants, G. Obie Sheets and Chester Sheets (Doing business as Friona Independent Oil Company),
By E. BYRON SINGLETON,
Of Counsel.

To the Honorable James C. Wilson, United States District Judge:

Now come G. Obie Sheets and Chester Sheets, doing business as Friona Independent Oil Company, the defendants in the above entitled and numbered cause, and move this Court for an order setting aside the verdict and judgment herein, and granting a new trial of the above entitled cause, and further move this Court to reconsider its order overruling defendants' motion to remand the above entitled cause to the State Court, and as grounds for said motions for new trial and reconsideration set forth the following reasons:

I.

The Court is in error in holding against the defendants in their motion to remand this cause, and in the Court's ruling that the cause was properly removable and was properly removed, and that such opinion of this Court, given in that regard, was erroneous in that:

(a) The Court is in error in its construction of waiver, in that the plaintiff by the act of selecting the State forum in its original suit for an amount in excess of $3,000.00, and being for $5,390.42, was such a selection of forum as bound nonresident plaintiff to hear all matters growing out of such transaction in the State forum;

(b) Plaintiff, in originally instituting its action in the State Court of Texas, by the filing of such action in excess of $3,000.00, realized that the defendants would
47 answer thereto by any proper defenses, off-sets, or counter-claims authorized under the laws of Texas for use in the State forum, and that nonresident plaintiff, with full knowledge of the answers, off-sets and

counter-claims which could be filed, selected the State forum and is bound by this selection, and thereby waived its right to thereafter request a removal of the cause to the Federal Court;

(c) The Court erred in its ruling that the nonresident plaintiff did not know that defendants would file a plea of privilege and answer setting up violation of the anti-trust statutes of the State of Texas, an off-set growing out of the transaction, and a counter-claim or cross-action growing out of the transaction, for the reason that the nonresident plaintiff is charged with knowledge of the law, and its ignorance of the law can be no defense to its election of the State forum over the Federal forum in its original institution of a cause of action in the State Court for an amount in excess of $3,000.00 in this cause, wherein among the parties there is a diversity of citizenship;

(d) The Court erred in its ruling with reference to the construction of election and waiver in that nonresident plaintiff has shown no surprise with reference to the pleadings filed by the defendants, both by way of answer, off-set and counterclaim, and since nonresident plaintiff knew, or was charged with knowledge of issues to be tried, and it elected the State Court, such election is a waiver of its right of selection, and this cause should be remanded.

II.

The Court is in error in holding that the counter-claim urged by defendants is an action which the Federal Court could have held original jurisdiction upon in itself, and being such a counter-claim to allow removal
48 of the cause, and the Court is in error in failing to remand to the State Court upon motion by defendants, for the reasons:

(a) Upon the pleadings then before the Court at the time of application for removal defendants' plea of "off-set" of the sum of $5,000.00, was in the nature of an abatement, and not an action upon which affirmative relief could be granted, and such allegation therein set forth"—and to continue the operations of hauling for plaintiff herein until the sum of $5,000.00 was earned by the defendants from the operation of said truck in the transportation of gasoline, to be used as an off-set to defendants' account";

(b) The Court erred in its ruling that a counter-claim cognizable in a sum in excess of $3,000.00 appeared in defendants' pleading, in that affirmative relief was limited expressly in defendants' pleading to the sum of $2,200.00, and being less than $3,000.00;

(c) The Court erred in its ruling that a counter-claim in excess of $3,000.00 existed in so far as the defensive pleas setting up violation of the anti-trust statutes of the State of Texas are concerned, in that such defenses were special defenses and were *tana*mount only to a not guilty and general denial plea, wherein no affirmative relief was prayed for;

(d) The Court erred in its ruling that a counter-claim in excess of $3,000.00 was evidenced by defendants' pleading with reference to the off-set and abatement plea of $5,000.00 for hauling, in that such plea was *tana*mount to the defense of payment from a special and specific fund yet to come into existence, and which special pleas of defense sought no affirmative relief, and was equivalent to a not guilty or general denial in so far as said $5,000.00 was concerned.

49 III.

The Court erred in its refusal to sustain the motion to remand to the State Court, in that the Shamrock Oil &

Gas Corporation is not such an original defendant as is entitled to remove this cause from the State Court, and said cause should be remanded.

IV.

The Court erred in refusing to remand this cause to the State Court, in that the Counter-claim contained no separable controversy, in that the basis of said cross-action grew out of the original transaction complained of in plaintiff's petition, and, likewise, the identical parties in cross-action are those in the original suit.

V.

The Court erred in refusing to remand the case to the State Court, in that the nonresident plaintiff filed its suit in the 108th Judicial District Court of Potter County, Texas, in cause No. 14,531, complaining of G. Obie Sheets and Chester Sheets, forming the partnership, doing business as and in the name of Friona Independent Oil Company, and presented its claim upon a verified itemized statement of account, praying judgment against the defendants in the sum of $5,390.42, and by virtue whereof nonresident plaintiff elected the State forum and waived its right to thereafter make application for removal.

VI.

The Court erred in refusing to submit the following fact questions to the Jury, which said fact questions were specially requested by defendants to be submitted as requested special issues:

(a) "Do you find from a preponderance of the evidence that on or about the 1st day of August, 1937, the defendant Chester Sheets, acting for the defendants, entered into a

verbal contract with the Shamrock Oil & Gas Corporation, through its agent Raymond Woolf, whereby the said defendants agreed that they would not sell, nor offer for sale, at their filling station, or stations, in Friona, Texas, any gasoline other than the gasoline of the said Shamrock Oil & Gas Corporation?";

(b) "Do you find from a preponderance of the evidence that Chester Sheets, acting for himself and his brother, G. Obie Sheets, entered into a verbal contract on or about the 20th day of December, 1938, supplementing the written contract which was entered into on or about the 16th day of May, 1939, wherein and whereby the plaintiff Shamrock Oil & Gas Corporation, acting through its agent Raymond Woolf, agreed that the defendants could pay $5,000.00 of the open account owed to the plaintiff corporation by the earnings from the use of defendants' equipment?";

(c) "Do you find from a preponderance of the evidence that the plaintiff Shamrock Oil & Gas Corporation, acting through its agent Raymond Woolf, agreed with the defendant Chester Sheets that it would not sell its gasoline to any other dealer in his territory, in and around Friona, Parmer County, Texas?";

(d) "Do you find from a preponderance of the evidence that the defendant Chester Sheets, for himself and on behalf of his brother G. Obie Sheets, entered into a contract with Shamrock Oil & Gas Corporation, acting by and through its agent Raymond Woolf, whereby Chester Sheets and G. Obie Sheets agreed to not sell the products purchased outside of that territory in and around Friona, in Parmer County, Texas?"

VII.

The Court erred in giving a general instructed charge on all issues other than that of regulation of price, in that

the testimony was conflicting on other issues controlled by the general charge, and that such conflict was peculiarly within the jury's province to reconcile such inconsistencies in the testimony of any witness, and which error is evidenced in the Court's instructed verdict to the jury with reference to the following facts:

(a) Whether or not defendants agreed to buy exclusively all gasoline which they may purchase for whatever purpose from the Shamrock Oil & Gas Corporation;

(b) Whether or not the Shamrock Oil & Gas Corporation required defendants, by an agreement, to sell gasoline only within a limited territory;

(c) Whether or not Shamrock Oil & Gas Corporation agreed with the defendants that it, in turn, would sell to no other person save and except the defendants within a definite territory;

(d) Whether or not an agreement existed between plaintiff and defendants whereby defendants could pay $5,000.00 of their debt out of a particular fund and being a fund to be created from hauling operations;

(e) Whether or not the plaintiff breached the contract with the defendants in the amount of the damages to the defendants by virtue of such breach, with reference to the breach of the contract for hauling.

VIII.

The Court erred in its oral charge to the jury in their consideration of the fact question of whether or not defendants agreed with plaintiff to sell the products of

plaintiff only at those prices at which the major Oil Companies sold like products, at Friona, Texas, in that:

(a) The oral charge of the Court placed an undue burden upon the defendants, in that it required the defendants to prove the existence of such contract beyond a doubt;

(b) The oral charge of the Court to the jury was erroneous in that it instructed the jury that if they had a doubt with reference to whether such a price agreement contract was entered into they were to find for the plaintiff and answer such question "no";

52 (c) The rule of preponderance of the evidence given to the jury was improper, whereby defendants were charged with carrying a greater burden of preponderance than required by law;

(d) The oral charge excluded all testimony introduced in the hearing of the trial other than the testimony of the defendant Chester Sheets and the testimony of Raymond Woolf with reference to what was said at the time of their meeting at Amarillo, Texas, and that the exclusion of the other evidence was materially detrimental to the defendants;

(e) The oral charge excluded a consideration of all of the corroborating testimony which evidenced that an agreement had been reached with reference to price fixing and such exclusion of that testimony is error;

(f) The oral charge of the Court was t*anamo*unt to an instructed verdict for the plaintiff, and, as such, was error.

IX.

Attorney for the plaintiff used prejudicial and improper argument in his final argument to the jury, in that he misquoted the record, as we remember such record, in telling the jury as a fact that there was no testimony to the effect that the Shamrock Oil & Gas Corporation sold to either the Phillips Petroleum Company or to the Texas Company, and since such stations were the only major Oil Company Stations at Friona, Texas, such statement of fact to the jury was calculated to cause them to believe, and upon information and belief defendants say that the jury did so believe, that such fact statement was true and thereby was to the material detriment of the defendants and was improper argument.

X.

Attorney for the plaintiff used prejudicial and improper argument in his final argument to the jury, in that, Mr. Dooley, in his closing argument in the case, used improper argument, clearly telling the jury the result of
53 its answer, he stating in his argument, in substance, the following:

"Gentlemen of the Jury, you should be careful, or go slow, before you answer this issue 'yes', because if you do answer the issue 'yes' then you might do this plaintiff Company an injustice; on the other hand, since the defendants admit that they got the merchandise and got the money if you should be mistaken in the evidence and if you answered it 'no' than you could not hurt the defendants."

Wherefore, defendants respectfully move this Court for the entry of a present order granting a new trial in the

above entitled cause and setting aside the judgment heretofore entered; and, likewise, pray that this Court upon a reconsideration of its order refusing defendants' prayer that the cause be remanded should in all things remand this cause to the State Court for trial.

Dated this the 23rd day of October, A. D. 1939.

MONNING & SINGLETON,
Attorneys for Defendants,
G. Obie Sheets and
Chester Sheets (Doing
business as Friona Independent Oil Company).
By E. BYRON SINGLETON,
Of Counsel.

Subscribed and sworn to, before me, by E. Byron Singleton, on this the 23rd day of October A. D. 1939.

MRS. J. E. BROWNING,
A Notary Public in and for
Potter County, Texas.

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54 ORDER OVERRULING MOTION FOR NEW TRIAL.

Filed: Mch. 11, 1940.

(Title Omitted.)

Be It Remembered that the Motion For A New Trial And Motion For Reconsideration Of The Court's Order Overruling Defendants' Motion To Remand, heretofore filed in the above entitled and numbered cause on the 23rd day of October, 1939, by the defendants, G. Obie

Sheets and Chester Sheets, doing business as Friona Independent Oil Company, having heretofore been fully presented to the Court and argument of counsel for both plaintiff and defendant having been heard thereon, and the Court having fully considered said Motion and argument is of the opinion and finds that said Motion and argube in all things overruled and refused.

Now Therefore be it Ordered, Adjudged and Decreed that said Motion For A New Trial And Motion For Reconsideration Of The Court's Order Overruling Defendants' Motion To Remand filed by the defendants herein, be, and the same are hereby, overruled and refused, to which action and ruling of the Court, the defendants, G. Obie Sheets and Chester Sheets, doing business as Friona Independent Oil Company, except and this day gave notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit sitting at New Orleans, Louisiana.

Done this the 6th day of March, 1940.

JAMES C. WILSON,
United States District Judge.

Approved as to form.

MONNING & SINGLETON,
E. BYRON SINGLETON.

55 NOTICE OF APPEAL.

Filed: Apr. 25, 1940.

In the United States District Court for the Northern District of Texas, Amarillo Division.

The Shamrock Oil & Gas Corporation, Complainant,
vs. Civil Action No. 73.
G. Obie Sheets and Chester Sheets, doing business as Friona Independent Oil Company, Defendants.

Notice is Hereby Given that G. Obie Sheets and Chester Sheets, doing business as Friona Independent Oil Company, the defendants above named, hereby appeal to the Circuit Court of Appeals for the Fifth Circuit, sitting at New Orleans, Louisiana, from the order of the District Court overruling defendants' motion to remand and from the judgment of the Court overruling the motion for a reconsideration of the Court's order overruling defendants' motion to remand, and being a final judgment entered in this action at the same time that the Court overruled the motion for a new trial herein, and which judgment was entered in this action on March 6th, 1940.

Dated this 18th day of April, A. D. 1940.

E. BYRON SINGLETON,
Of Counsel.

MONNING & SINGLETON,
Attorneys for Appellants.
G. OBIE SHEETS and CHESTER SHEETS,
Doing business as Friona Independent Oil Company.

56 COST BOND.

Filed: Apr. 25, 1940.

(Title Omitted.)

Know All Men By These Presents, that G. Obie Sheets and Chester Sheets, as principals, and the other undersigned, as sureties, are holden and stand firmly bound and obligated unto The Shamrock Oil & Gas Corporation, a corporation, with an office and place of business in Amarillo, Potter County, Texas, in the full and just sum of Two Hundred Fifty Dollars($250.00) to be paid unto the said The Shamrock Oil & Gas Corporation, its successors or assigns, to the which payment well and truly to be paid, the said G. Obie Sheets and Chester Sheets, their heirs, executors and assigns, and the other undersigned, their heirs, executors and assigns, do bind themselves firmly by these presents.

The Condition of this obligation is such that whereas the District Court of the United States for the Northern District of Texas, Amarillo Division, entered its final order on March 6, 1940, overruling the motion to remand this cause to the District Court of Parmer County, Texas, which said order was entered after the presentation of a motion for a reconsideration of the previous order overruling defendants' motion to remand said cause and after a final judgment on the merits of said cause, entered on the 13th day of October, 1939, in favor of The Shamrock Oil and Gas Corporation against the defendants, G. Obie Sheets and Chester Sheets, jointly and severally, and as partners, doing business as and in the
57 name of Friona Independent Oil Company, for the amount of $5,390.42, with interest at the rate of 6% per annum from the 14th day of May, 1939, to date of judgment, in the total sum of $5,524.28, and that

said judgment shall bear interest from date of judgment at the rate of 6% per annum, and further taxing all costs incurred against said defendants, and from which order defendants desire to appeal to the Circuit Court of Appeals of the United States in and for the Fifth Circuit, sitting at New Orleans, Louisiana;

Now, Therefore, if the said obligors shall pay all the costs awarded or decreed against them by the Court in the above-described cause if the appeal is dismissed or the judgment affirmed, or for such part of the costs as the Circuit Court of Appeals of the United States in and for the Fifth Circuit, sitting at New Orleans, Louisiana, may award against them if the judgment be modified, then this obligation shall be void.

In Witness Whereof we have hereunto set our hands on this the 13th day of April, A. D. 1940.

OBIE SHEETS,
CHESTER SHEETS,
Principals.
CLYDE SEAMOND,
MRS. OLA SHEETS,
Sureties.

Approved this .... day of April, A. D. 1940.

.....

United States of America,
Northern District of Texas,
Parmer County, ss.

Clyed Seamond and Mrs. Ola Sheets, being duly sworn, each deposes and says that they are the sureties named in the foregoing bond; that they reside at Friona,
58 Parmer County, Texas; that they are residents of and householders within the State of Texas, and are each worth Five Hundred Dollars over and above all

the debts and liabilities which they owe or have incurred, and exclusive of the property exempt by law from levy and sale under an execution.

CLYDE SEAMOND,
MRS. OLA SHEETS.

Subscribed and sworn to before me, on this the 13th day of April, A. D. 1940, to certify which witness my hand and seal of office.

J. W. WHITE,
A Notary Public in and for
Parmer County, Texas.

The State of Texas,
County of Parmer.

I, Earl Booth, Sheriff of Parmer County, State of Texas, do hereby certify that in my estimation the sureties on the foregoing bond are well and sufficiently financially able to care for the amount stipulated in such bond, and that the property and valuations set forth therein are in my estimation true and correct, and were this bond submitted to me I would accept same.

Witness my hand, this the 12 day of April, A. D. 1940.

EARL BOOTH,
Sherif of Parmer County,
Texas.

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59 DEFENDANTS' DESIGNATION FOR RECORD.

Filed: Apr. 25, 1940.

(Title Omitted.)

Come now G. Obie Sheets and Chester Sheets, doing business as Friona Independent Oil Company, defendants

herein, and submit this their Assignments of Error and designation of the portion of the record and proceedings in evidence to be contained in the record on appeal, and say:

I.

The Court erred in its order overruling defendants' motion to remand to the State Court, and erred, as well, in its order and judgment overruling defendants' motion for a reconsideration of that order denying defendants' right to remand; no other order or judgment, or error in order or judgment, is complained of save and except that error of the Court in failing to remand the cause from the United States District Court for the Northern District of Texas, sitting at Amarillo, to the District Court for the State in and for Parmer County, Texas.

Wherefore, defendants herein and appellants designate as pertinent for consideration by the Circuit Court of Appeals of this record the following portions of the transcript:

1. Shamrock Oil & Gas Corporation's Original Petition filed in Potter County, Texas;

60 2. Plea of Privilege of defendants, G. Obie Sheets and Chester Sheets, doing business as Friona Independent Oil Company, filed in Potter County, Texas;

3. Order of the District Court of Potter County, Texas, transferring the cause to Parmer County, Texas;

4. Answer and Cross-action of defendants, G. Obie Sheets and Chester Sheets, doing business as Friona Independent Oil Company, filed in Parmer County, Texas;

5. Petition for removal and bond of Shamrock Oil & Gas Corporation;

6. Order of removal from the District Court of Parmer County, Texas, to the United States District Court for the Northern District of Texas, sitting at Amarillo, Texas;

7. Motion to remand by defendants, G. Obie Sheets and Chester Sheets, doing business as Friona Independent Oil Company;

8. Answer of Shamrock Oil & Gas Corporation to motion to remand;

9. Order overruling motion to remand by the United States District Court for the Northern District of Texas, Amarillo Division;

10. Judgment entered on the 13th day of October, 1939, by the United States District Court for the Northern District of Texas, Amarillo Division;

11. Motion by defendants, G. Obie Sheets and Chester Sheets, doing business as Friona Independent Oil Company, for a reconsideration of the Court's order overruling the motion to remand and motion for new trial;

12. Answer of Shamrock Oil & Gas Corporation to motion for reconsideration of Court's order overruling motion to remand and motion for new trial;

13. Order and judgment dated March 6, 1940, overruling and refusing motion for reconsideration of the Court's order overruling motion to remand and motion for new trial;

14. Notice of Appeal; and, Bond for Costs;

15. This designation;

16. Application for Permission to Take Appeal, and Order Allowing Appeal;

17. Assignments of Error;

61 Wherefore, defendants, G. Obie Sheets and Chester Sheets, doing business as Friona Independent Oil Company, and appellants herein, evidence that in view of the order complained of that the above parts of the transcript designated are the sole and only records necessary for an appeal to the United States Circuit Court of Appeals for the Fifth Circuit, sitting at New Orleans, Louisiana.

E. BYRON SINGLETON,
Of Counsel.

Monning & Singleton, 1014 Fisk Building, Amarillo, Texas, Attorneys for Appellants, G. Obie Sheets and Chester Sheets, doing business as Friona Independent Oil Company.

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62 APPLICATION FOR LEAVE TO APPEAL.

Filed: Apr. 18, 1940.

(Title Omitted.)

To the Honorable James C. Wilson, United States District Judge:

G. Obie Sheets and Chester Sheets, doing business as Friona Independent Oil Company, your petitioners, who are the defendants in the above entitled cause, pray that they may be permitted to take an appeal from that order

of this Court overruling their motion to remand this cause to the District Court of Parmer County, Texas, which such order was finally entered on the 6th day of March, 1940, after a final judgment on the merits in this case, which such order was entered after the presentation of a motion of these defendants for a reconsideration of the previous order overruling defendants' motion to remand the above entitled cause; your petitioners pray that they may be permitted to take an appeal to the Circuit Court of Appeals of the United States in and for the Fifth Circuit, sitting at New Orleans, Louisiana, for the reasons specified in the assignments of error which are filed herewith.

Your petitioners pray that that portion of the transcript of the record and proceedings and papers in this cause, duly authenticated, may be sent to the Circuit Court of Appeals of the United States in and for the Fifth Circuit, sitting at New Orleans, Louisiana.

Your petitioners have filed herewith an appeal bond in the sum of $250.00, together with notice of appeal, and such bond is conditioned to secure the payment of costs if the appeal is dismissed or the judgment affirmed, or for such part of the costs as the Circuit Court of Appeals of the United States in and for the Fifth Circuit, sitting at New Orleans, Louisiana, may award if the judgment be modified. Your petitioners pray that this bond in the amount stipulated therein be approved.

63

E. BYRON SINGLETON,
Of Counsel.

Monning & Singleton, 1014 Fisk Building, Amarillo, Texas, Attorneys for Appellants, G. Obie Sheets and Chester Sheets, doing business as Friona Independent Oil Company.

64 ORDER OF JUDGE JAMES C. WILSON ALLOWING APPEAL.

Filed: Apr. 22, 1940.

(Title Omitted.)

The petition of G. Obie Sheets and Chester Sheets, doing business as Friona Independent Oil Company, defendants in the above entitled cause, for an appeal from the order of this Court overruling their motion to remand this cause to the District Court of Parmer County, Texas, as such order was finally entered on the 6th day of March, 1940, upon a consideration of the motion of these defendants for a reconsideration of this order overruling defendants' said motion to remand, and being after a final decision and hearing on the merits, is hereby granted and an appeal is allowed; the bond in the sum of $250.00, together with the sureties thereon, is hereby approved, and the Clerk is required to prepare a transcript, inclusive of the items designated and likewise including therein any portions prayed for by Appellee, The Shamrock Oil & Gas Corporation, which may hereafter be found proper and appropriate.

Dated this the 20 day of April, A. D. 1940.

JAMES C. WILSON,
United States District Judge.

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65 DEFENDANTS' ASSIGNMENT OF ERRORS.

Filed: Apr. 25, 1940.

(Title Omitted.)

Come now G. Obie Sheets and Chester Sheets, doing business as Friona Independent Oil Company, defendants in the above entitled cause, and file the following Assign-

ments of Error upon which they will rely in the prosecution of the appeal herein prayed for in said cause, from the order of this Court entered on the 6th day of March, 1940.

I.

The Court erred in refusing the motion of defendants to remand this cause to the District Court of the State of Texas in and for Parmer County for the reasons that:

1. The Court is in error in holding against the defendants in their motion to remand this cause, and in the Court's ruling that the cause was properly removable and was properly removed, and that such opinion of this Court, given in that regard, was erroneous in that:

(a) The Court is in error in its construction of waiver, in that the plaintiff by the act of selecting the State forum in its original suit for an amount in excess of $3,000.00, and being for $5,390.42, was such a selection of forum as bound nonresident plaintiff to hear all matters growing out of such transaction in the State forum;

(b) Plaintiff, in originally instituting its action in the State Court of Texas, by the filing of such action in excess of $3,000.00, realized that the defendants would answer thereto by any proper defenses, off-sets, or counter-claims authorized under the laws of Texas for use in the State forum, and that nonresident plaintiff,
66 with full knowledge of the answers, off-sets and counter-claims which could be filed, selected the State forum and is bound by this selection, and thereby waived its right to thereafter request a removal of the cause to the Federal Court;

(c) The Court erred in its ruling that the nonresident plaintiff did not know that defendants would file a plea of privilege and answer setting up violation of the anti-trust statutes of the State of Texas, an off-set growing out of the transaction, and a counter-claim or cross-action growing out of the transaction, for the reason that the nonresident plaintiff is charged with knowledge of the law, and its ignorance of the law can be no defense to its election of the State forum over the Federal forum in its original institution of a cause of action in the State Court for an amount in excess of $3,000.00 in this cause, wherein among the parties there is a diversity of citizenship;

(d) The Court erred in its ruling with reference to the construction of election and waiver in that nonresident plaintiff has shown no surprise with reference to the pleadings filed by the defendants, both by way of answer, off-set and counterclaim, and since nonresident plaintiff knew, or was charged with knowledge, of issues to be tried, and it elected the State Court, such election is a waiver of its right of selection, and this cause should be remanded.

2. The Court is in error in holding that the counter-claim urged by defendants is an action which the Federal Court could have held original jurisdiction upon in itself, and being such a counter-claim to allow removal of the cause, and the Court is in error in failing to remand to the State Court upon the motion by defendants, for the reasons:

(a) Upon the pleadings then before the Court at the time of application for removal defendants' plea of "off-set" of the sum of $5,000.00, was in the nature of an abatement, and not an action upon which affirmative relief

could be granted, and such allegation therein set forth "—and to continue the operations of hauling for plaintiff herein until the sum of $5,000.00 was earned by the defendants from the operation of said truck in the transportation of gasoline, to be used an an off-set to defendants' account.";

(b) The Court erred in its ruling that a counter-claim cognizable in a sum in excess of $3,000.00 appeared in defendants' pleading, in that affirmative relief was limited expressly in defendants' pleading to the sum of $2,200.00, and being less than $3,000.00;

67 (c) The Court erred in its ruling that a counter-claim in excess of $3,000.00 existed in so far as the defensive pleas setting up violation of the anti-trust statutes of the State of Texas are concerned, in that such defenses were special defenses and were tanamount only to a not guilty and general denial plea, wherein no affirmative relief was prayed for;

(d) The Court erred in its ruling that a counter-claim in excess of $3,000.00 was evidenced by defendants' pleading with reference to the off-set and abatement plea of $5,000.00 for hauling, in that such plea was tanamount to the defense of payment from a special and specific fund yet to come into existence, and which special pleas of defense sought no affirmative relief, and was equivalent to a not guilty or general denial in so far as said $5,000.00 was concerned.

3. The Court erred in its refusal to sustain the motion to remand to the State Court, in that the Shamrock Oil & Gas Corporation is not such an original defendant as is entitled to remove this cause from the State Court, and said cause should be remanded.

4. The Court erred in refusing to remand this cause to the State Court, in that the counter-claim contained no separable controversy, in that the basis of said cross-action grew out of the original transaction complained of in plaintiff's petition, and, likewise, the identical parties in cross-action are those in the original suit.

5. The Court erred in refusing to remand the case to the State court, in that the nonresident plaintiff filed its suit in the 108th Judicial District Court of Potter County, Texas, in cause No. 14,531, complaining of G. Obie Sheets and Chester Sheets, forming the partnership, doing business as and in the name of Friona Independent Oil Company, and presented its claim upon a verified itemized statement of account, praying judgment against the defendants in the sum of $5,390.42 and by virtue whereof nonresident plaintiff elected the State forum and waived its right to thereafter make application for removal.

Wherefore, defendants as appellants herein, pray that said order may be reversed and for such other and further relief as to the Court may seem just and proper.

Dated this the 18th day of April, A. D. 1940.

E. BYRON SINGLETON,
Of Counsel.

68

Monning & Singleton, 1014 Fisk Building, Amarillo, Texas, Attorneys for Appellants, G. Obie Sheets and Chester Sheets, doing business as Friona Independent Oil Company.

69 NOTICE OF REMOVAL, omitted from the printed record, pursuant to Rule 23 of this Court.

* * * * * * * * * *

71 ORAL OPINION OF JUDGE JAMES C. WILSON.

Filed: May 2, 1940.

(Title Omitted.)

Sept. 25, 1939.

I will dispose of the motion to remand in the case of the Shamrock Oil & Gas Corporation vs. G. Obie Sheets and Chester Sheets. There being no exact authority on the principal question really decisive of the motion, I felt for the purpose of the record anyway, the Court should state rather fully the reasons for the conclusion reached.

Now, as I understand it from the pleadings and the arguments, the situation is this: The Shamrock Oil & Gas Corporation is a manufacturer of gasoline and other products of crude petroleum, with its principal place of business in Moore County, Texas; that it has an office and place of business in Potter County; that it is a Delaware corporation; that these defendants are citizens of Texas, and reside in Parmer County, Texas; that the plaintiff is a distributor of its manufactured products to dealers, such as gasoline stations, throughout this section of Texas; that sometime in the early part of 1937, the plaintiff made a contract with the Sheets brothers, defendants, by which they were to become, within limited areas, distributors of the products of the plaintiff; that the contract, however, attempted to make them independent contractors, with the title of such goods

72 passing to defendants upon delivery to them; that such contract resulted in an open running account, with credits and charges, and continued until in July of this year, when it amounted to something over $5,300.00; that the plaintiff company about that time sued the defendants on this open account, the items of which

ran from the early part of 1938 to near July of this year, in Potter County, Texas, where the plaintiff had an office; that immediately thereafter, the defendants filed their plea of privilege, to be sued in the county of their residence, and that this plea was not resisted by plaintiff, and could not have been successfully, and the case was transferred to Parmer County; that then the defendants filed their answer to the claim. It contained a general demurrer and general denial; but there were no specific charges or credits alleged by the plaintiffs denied. The defendants sought to defeat the entire account on the ground that the contract as entered into between plaintiff and defendants was in violation of the anti-trust laws of Texas, and was, therefore, a void and non-collectable account.

I will not read all that feature of the answer, but in substance is, that about the first of the year of 1937 the plaintiff entered into an agreement with the defendants whereby they bound themselves to sell the products at a price named by plaintiff, and to exclusively handle the products of the plaintiff; that this amounted to a conspiracy in restraint of trade, and in violation of the Texas statutes. It further alleged at the same time and other times, the agreement by them provided that they were to comply with the price regulations made by the major oil corporations and follow their price fluctuations, and that this was in furtherance of a monopoly, and made the contract void and unenforceable, and of which they ask judgment.

Now, in addition, the defendants filed, what they call, a cross-action and offset, but which, of course, whatever it may be called, is a counter-claim, being as follows:

73 "And, by way of cross-action and as an off-set defendants and cross plaintiffs further say:

"On or about the 1st day of February, 1939, plaintiff entered into an agreement with the defendants, and each of them, whereby the defendants were to purchase newer and improved equipment for the *transporation* of gasoline, and were, in turn, to lease said truck by hauling Shamrock gasoline from Shamrock plants to the various retail establishments created by the plaintiff herein, and were to use said truck and to have the depreciation, up-keep, and cost of operation of said truck paid by the plaintiff and to continue the operation of hauling for plaintiff herein until the sum of $5,000.00 was earned by the defendants from the operation of said truck in the *transporation* of gasoline, to be used as an off-set to the defendant's account; that immediately thereafter, to induce the defendants, and each of them, to expend their funds for such gasoline truck and *transporation* equipment, and to cause them to enter into such contract with plaintiff for hauling of such gasoline, plaintiff agreed to allow defendants to continue to operate at least one truck in such manner, whereby plaintiff was obligated to pay the salary of the driver, the cost of operation, depreciation, and upkeep and to yield a sum of approximately $300.00 monthly to the defendants, and that said contract should continue indefinitely, as long as defendants desired to continue making said hauls; that although defendants placed themselves in a position to make such hauls and commenced making such hauls, soon thereafter plaintiff refused to allow defendants to haul its gasoline, and soon thereafter concluded its sale of gasoline to these defendants.

"Wherefore, defendants and each of them, have been damaged in the sum of $5,000.00, which should be allowed as an off-set to any claim which plaintiff may have herein, and in the further sum of $2,200.00 for which defendants pray by way of cross-action against the plaintiff herein."

Immediately thereafter and in due time, the plaintiff, non-resident, filed a bond and petition for removal to this Court. They possessed the statutory requisites. It was removed. Following that the defendants filed this motion to remand.

I refer to only one ground assigned in the motion, and that is that, by plaintiff filing the suit in the State District Court of Potter County it elected to try the suit in the State District Court, and waived its right to remove under the statute. The effect of it is that plaintiff elected to try its suit, including this counter-claim, in any District Court of the State, where the proper venue of it lay.

74 Now, we know that the mere filing of such a suit by a non-resident is not an absolute bar to such a removal by it. For example, it is conceded where a non-resident sues a resident of the state, in a State Court, for an amount less than the jurisdiction amount of the Federal Court, and such resident defendant brings in a counter-claim greater than $3,000.00 exclusive of interest and cost, such non-resident plaintiff may then properly remove the case to the Federal Court. Those decisions really turn on a question of intent, and it follows, more or less, on a fact question. In other words, those authorities now unanimously hold as conclusive, from the circumstances of a non-resident filing a suit in a State Court for less than $3,000.00, that there is no intent on the part of such non-resident to waive its right to removal, for the simple reason it could not have been filed in the Federal Court. In such circumstances it is necessary to file it in the State Court, or not file anywhere. Upon that the Courts argue, which is obviously correct, that it conclusively shows that there is an absence of a proven intent of the non-resident to waive this right, which is considered and is a valuable right. Those authorities, however, are not in point here, but their reasoning is helpful.

Here the plaintiff, a non-resident corporation, sued the defendants who were residents of Parmer County, Texas, in the District Court of Potter County, for a sum in excess of $5,000.00, and it was transferred to a District Court of Parmer County on a plea of privilege by defendants, and there defendants filed a counter-claim for more than $6,000.00. Can the non-resident remove to this Court? As stated, there are no authorities exactly in point. All of the authorities, certainly all the Federal and Texas authorities are agreed that, when the defendant files a counter-claim such as this he becomes, as to it, plaintiff, and the plaintiff, as to such counter-claim becomes defendant. That is really not questioned by anybody here, and the viewpoint of the Federal Courts, as well as Texas Courts is very well expressed in 38 Texas Jurisprudence p. 292, Section 6:

75

"A cross bill or cross action, or a plea in reconvention, or a set off or counter claim is, or occupies the same position as, an independent suit by the defendant in the original suit against the plaintiff. As to the matter asserted in his cross action or plea the defendant is the actor or plaintiff; and he has the rights and responsibilities of a plaintiff; while the plaintiff in the original suit is a defendant, with the privileges of a defendant. In other words, each party is plaintiff in respect to his own particular grievance and eacn party is defendant in respect to the grievance of the other. There are two cases which may be tried together in the same proceeding, or it has been said two actions are really combined into one."

That part of the removal statute applicable here, reads:

Sec. 71 of Title 28:

"Any other suit of a civil nature, at law or in equity, of which the District Courts of the United States are

given jurisdiction, in any State Court, may be removed into the District Court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that Sate. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the District Court of the United States for the proper district."

There is really no controversy as to plaintiff's cause of action. As to the counter-claim the parties had a controversy, in a State Court wholly between citizens of different states, with the parties re-arranged so the defendants were plaintiffs and the plaintiff was defendant. The amount in controversy is in excess of $3,000.00 exclusive of interest and cost. An incontrovertible right, under the statute, is thus shown in the non-resident to remove, unless that right has been lost. The defendants insist that it was lost by the non-resident waiving its right to remove, by filing its account in a State Court which was without authority to try it, and a State Court other than the one to which it was removed by defendants.

The question is, was there a waiver by this non-resident to try this counter-claim, in the Federal Court? Deciding that question, resolves itself largely into a question of intent or fact.

76 My friend, Judge Peters of Maine, dealt with waiver in the case of Houlton Savings Bank vs. American Laundry Machinery Co., 7 Fed. Suppl. 858. He said:

"A waiver is the voluntary relinquishment of a known right. The only evidence of an intention on the part

of this defendant to relinquish its right to have a possible controversy with the banks about this property settled in this Court is that he brought in the State Court a suit against another party involving other rights in the same property. This act is certainly not 'Irreconcilably repugnant to the assertion of its legal right'.

"The defendant should not be deprived of its constitutional and statutory right to a trial in a Court of the United States upon the ground of waiver, 'unless a clear case of intent to submit and have a hearing in the State Court is made to appear".

It must be kept in mind that such a waiver, if it exists and is shown, must be of a known right. The right involved here is the right to remove the suit filed by defendants against plaintiff. Defendants' claim is pleaded in offset, but really is a separate suit from the one filed by plaintiff. Circumstances must be sufficient to show that the party had in mind the right which he is claimed to have waived, and knowing of such right, waived it.

As a circumstance tending to disprove such an intent, it is well to note that this corporation filed this suit, not in Parmer County, the home of these defendants, but in Potter County, where it has an office, and as far as I know, its principal office. It filed it on a mere open, running, account, about which it had a right to expect no serious controversy, and that was confirmed by the fact that in the State Court not an item of it was specifically denied. In similar cases it has been argued that, the non-resident must take notice that counter-claims might be filed. Certain Courts in dealing with that suggestion have properly said, "that is begging the question". That proposition cannot be sustained except upon the theory that a non-resident irrevocably loses the right to remove by filing such a suit. There is no

77 sense here in charging this plaintiff with notice, similar to notice by filing instruments of record, etc. That would be what it would amount to if plaintiff is charged with notice here. For the purpose of this question, nothing must be assumed against a plaintiff to the effect of knowledge that everything was going to happen in the State Court that did thereafter happen. Now the plea of privilege filed, taking all into account that happened in that connection, what bearing has it on this question of intent? Can it be reasonably assumed from the fact that plaintiff did not take a non-suit when the plea of privilege was filed that it was willing to try out with defendants their counter-claim, later filed, in the District Court of Parmer County? However far fetched and unreasonable that counter-claim on its face may be, it would be nothing less than absurd, nothing less than false, for one to hold any such thing. The plaintiff is a corporation and a rather large one. Parmer County is a sparsely settled county, the home of these defendants, likely with local prejudice against foreign, or any other kind of corporations; with a like local prejudice or bias in favor of these defendants; where if a jury was impaneled, in all probability, the defendants would have a personal acquaintance with all of them and possibly a friendship with many of them. Regardless of the fairness and ability of the State Judges the effect upon the final results of the fact finding power of the jury cannot be, and is not, overlooked by such litigants. It is safe to say, to take advantage of these factors, you might say most of them matters of common knowledge, was the chief aim of defendants in filing the plea of privilege, since even in Parmer County they did not challenge the correctness of plaintiff's claim. In passing on this matter of whether plaintiff had a clear intent to submit generally to the jurisdiction of the State Court to try defendants' counter-claim against it

why not look at the naked truths that would appear in the picture if it had considered such a thing? The most that could fairly be assumed from its failure to take a non-suit and their permitting the case to go to Parmer County is that it was willing to try out its cause of action against defendants, together with any
78 strictly defensive pleas, in the county of their residence. Of course, after the counter-claim was filed in the State Court, both as a counter-claim and as an offset, plaintiff could not dismiss the case. It then had no alternative but to remove.

There is a substantial right involved under the removal statutes. Why should this Court be holding as a fact, or holding as true, something it knows in reason, or knows absolutely, is not the truth. In other words, this Court knows that by no stretch of imagination, did this plaintiff ever intend to let itself be tried in Parmer County, on any suit that defendants might file against. Defendants' position as to plaintiff's intent could be stronger argued if they had filed their counter-claim in the District Court of Potter County. The only State Court plaintiff chose to try its cause was the Potter County District Court. It did not choose the District Court of Parmer County. Pleading the counter-claim as an offset is simply an ingenious device to deprive plaintiff of its right to remove to this Court. As to defendants collecting any judgment they might procure against plaintiff, it made no difference whether defendants' claim was pleaded only as a counter-claim or as both.

This removal statute is supposed to be based upon the best of reasons. Especially should I so hold when I know it is not the truth, and when it deprives plaintiff of a valuable right, and a right that is considered to be reassuring and a protection to non-residents against jury verdicts rendered, not of the facts and the law of the case, but upon bias, local prejudice, personal friendships

and every other kind of sentimental consideration that might enter into it. Touching that, I am like the District Judge of South Carolina, in the case of the American Fruit Growers vs. Laroche, 39 F. (2d) 243. He was dealing with this question of waiver, and he also
79 had the feature, as to whether there was an understanding of the parties to waive known rights. I think what he said fits this case:

"It is only by the most technical reasoning and by laying aside the actualities of the case and the real position of the parties that the right to remove can be denied."

For this Court to do that, it would have to base its action upon fictional and technical considerations, a thing I do not care to do. For the reasons stated, your motion to remand will be overruled.

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80 CHARGE OF COURT.

Filed May 11, 1940.

(Title Omitted.)

Gentlemen of the Jury:

The plaintiff at the conclusion of the evidence presented a motion to the Court for an instructed verdict in its behalf, the position being that taking all of the evidence into consideration before you, that presented by the defendant particularly, and treating it as true, that it did not legally make out the case alleged by the defendants in their counterclaim and in their defense against the plaintiff. As I told you in the previous charge, some of these matters were decided for each

side. I decided against the plaintiffs on their contention that the evidence as introduced by the defendants touching the issue as to price fixing would not constitute a violation of the anti-trust laws as testified to by the defendants. It struck me if the thing were as the defendants related in their testimony as to that price fixing issue, that it would constitute a violation of the anti-trust laws of Texas, so that left an issue of fact which was submitted to you and you have found on that fact issue against the defendants.

As I indicated to you in the previous charge I considered all other questions resolved themselves really into questions of law which were matters for the
81 Court to decide. In view of your verdict and the conclusions that I have reached on the matters I held for myself to dispose of, I am going to instruct you on the whole case to find a verdict for the plaintiff.

Now, one other issue on the anti-trust question, under the testimony of the defendants, was whether they had agreed in this contract to buy all of their gasoline and oil products from the plaintiff. That is in substance the allegation of the defendants. Taking, however, the testimony of the defendant Chester Sheets, I believe his name is, it appeared to me that his testimony was different from his pleading. That his testimony did not support the claim that the plaintiff had required them to agree to buy all of such products from them. I reached that conclusion after I called upon the Court Reporter to transcribe for me the testimony of Mr. Chester Sheets bearing upon that issue. He isn't only a witness in the case, but he is a party to the suit and he is the only one on his side that claims to know what this contract was, since he was the one that negotiated the contract with Mr. Wolfe—I believe the name is—so, being a party, what he says about it constitutes not only testimony but more than that. It constitutes an admission on his part

as to whether the agreement was that the plaintiff Shamrock Company required them to buy all of such products from them, or whether it was simply the agreement that they would buy all of such products that were sold at the Friona station from them. That was the matter that I wanted to settle. The cross-examination of Mr. Sutton of defendant Sheets on that issue is quite lengthy, and I will not read all of it, but certain of the questions and answers I will read:

(By Mr. Sutton):

Question: Now, as I understood you to testify this morning, Mr. Wolfe said you would have to buy all your needs there, all you needed for that station, from the Shamrock?

Answer: That I would have to buy all I used for that station, couldn't buy from any other company.

Question: Yes. That was what you testified to?

82

Answer: Yes, sir.

Question: Was that agreement as to all your requirements that you needed for that station; was that what he requested you to do?

Answer: All my needs.

Question: All the gasoline you needed for that station, is that what I understand your testimony was?

Answer: Understanding? I guess so. Don't know what you are exactly getting at.

Question: I am just trying to get at what you said Mr. Wolfe required you to do, and asked you to do. Did I understand you to say that he said you would buy all your needs, of the gasoline you needed for that station, you would buy from Shamrock? Exclusively?

Answer: Yes, sir.

Question: That was only as to the amount of gasoline, all you need to operate that station, is that right?

Answer: Yes, sir.

Question: And that was what the agreement was?

Answer: Yes, sir.

Question: Now then, that and the price, was that the only conditions that he put upon your right to purchase, is that right?

Answer: I reckon so, as far as I know.

Question: Beg pardon?

Answer: I reckon so, as far as I know.

Question: Well, I want to see if I understand you now. You testified you went in there to talk to Mr. Wolfe about handling Shamrock Oil and Gasoline Corporation gasoline?

Answer: Yes, sir.

Question: He said, "All right, you could sell Shamrock gasoline down there, but you have to agree that you would not sell it below the major prices and
83 that you would further have to agree that all gas—that you buy all the gas you needed for that station from the Shamrock; now, is that what he said?

Answer: Yes, sir.

There are several pages here to the same effect, but as I say, not necessary to read. Now, gentlemen, I hold that testimony of Mr. Sheets to represent facts about that agreement. It is my view under the case of Cox, Inc., vs. Humble Oil and Refining Co., 16 S. W. (2d) 285, that such an agreement does not constitute a violation of the anti-trust laws of Texas. That case was by the Commission of Appeals, and was expressly approved by the Supreme Court of this State. Part of the decision bearing directly on that phase:

"It is further insisted that the recovery sought and obtained by plaintiff in error is for breach of an alleged contract in restraint of trade, and Wood vs. Texas Ice

and Cold Storage Co., (Tex. Civ. App.) 171 S. W. 497, is cited to sustain the proposition that no action is maintainable thereunder. We are of the opinion that the contract condemned in the above case is unlike that involved in this case. There the contract obligated Wood "to make all of his purchases from the first party during the term of this contract". We think it was correctly determined in that case that the contract was in violation of the provision of our anti-trust laws, defining a conspiracy in restraint of trade as being where two persons, firms, or corporations engaged in buying or selling any community agree to refuse to buy such commodity from or sell it to any other person, firm, etc. Here plaintiff in error did not agree to buy all of the gasoline purchased by him from defendant in error. The agreement was that he would buy the amount used in the operation of a certain filling station. He was at liberty to purchase any amount of gasoline from any other company which might be used in the operation of any other similar business. The effect of the agreement made by him was to contract to purchase gasoline from defendant in error, the amount to be measured by that used in the operation of a particular filling station. Such agreement did not constitute a conspiracy in restraint of trade, but was a valid and enforceable one."

Now, under the testimony read to you, it resolves the matter into a question, not disputed in my view, that under the contract here the Shamrock wasn't bound to confine its sale to the defendant, but could and
84 did sell its gas to anyone it desired in addition to these defendants. On the other hand the defendants were limited under this contract only to purchase from the plaintiff the gasoline for the one station at Friona. The defendants were at liberty to buy gasoline elsewhere that they might see fit to sell at places

other than this Friona station. Under this contract the public were free to buy gas of the Shamrock company, and the defendants were free to buy like gas from any other refining company, except such as they were to sell at the particular station at Friona. The public were therefore in no manner prejudiced by the operation of that contract, and essentially had no interest in it. And for the reasons assigned in this decision just read, it is my view that the defendants have not made out that branch of their case. This case I have just read over was re-affirmed in the case of Jones Investment Company vs. Great A. and P. Tea Co., 65 S. W. (2d) 495, it being therein again expressly approved by the Supreme Court.

Gentlemen, this discussion by the Court may not be very interesting to you, but it is necessary for this Court in disposing of the case in this way, with a view of possible appeal of the case, to give either an oral charge or a written charge the ground—the reasons, under the rules, for the Court's action. In other words so that the reason may become a matter of record. Now, the remaining issue which isn't submitted to you, and which I am disposing of myself, is the question of damages claimed by the defendant, approximately in the sum of six thousand dollars, for the alleged breach by the plaintiff of the truck contract, or the new truck contract, I will say. The first contract, when it was made, I don't remember, but along with it the defendants, Sheets Brothers, leased to the plaintiff a Chevrolet truck. Just what the compensation was to be paid for that truck is expressed in the written contract, 16th day of May, 1938, and what it was to be is immaterial—in effect, the net made by the operation of the truck. The defendants allege that during December of that year that they had a con-
85 tract by which they were to substitute a new truck in lieu of the old Chevrolet truck. That

they did this pursuant to that contract. That after the lease plaintiff was to run it day and night until it paid to the defendants a rental of approximately five thousand dollars, and which rental or lease return for the truck was to be applied to the liquidation of this standing account which is here sued upon. And they allege that delivery of that truck was made and that they entered in on the operation under that contract and that it was breached and that if it had not been they would have made profits in the amount of these damages claimed, etc. Now, I am eliminating that issue of damages, or disposing of it myself, against the defendants for these reasons. The undisputed evidence here is, and there are records covering that fact, that the defendants did not actually deliver that new truck until about the middle of March of 1939, and that the plaintiffs only used it until the 15th day of April of 1939. That date is on the face of the original contract following the words "canceled". In other words, as to that issue the facts boiled down make the issue for whatever the contract might have been for only a period of approximately one month. In other words it reduces, under the undisputed evidence, that claim of damages in any event, if the defendants were entitled to it, has been reduced to a trifling sum, the net, whatever it would be for that particular month. If allowed damages it would be—it could not be by any possibility, to allow it legally, to allow it for more than just nominal damages. But to my view the evidence here introduced to support the claim on a basis of six thousand dollars is so speculative, and leaves that issue in such a state of uncertainty that if I instructed you to go out and try to ascertain the damages figured on the basis of that month, one month, that the most you could do would be to absolutely guess at it. You wouldn't know now how to figure it. I say you would not. I would not, taking the character of evi-

dence that was introduced. Either it would be
86 purely speculative and purely irresponsible to my view in using it as a jury or Court should use evidence, to fill out a verdict for or against anybody, and for that reason I am just simply in effect eliminating that issue. It is to all intents and purposes eliminated by the undisputed evidence here before you. And for the reasons stated as heretofore given and because this truck contract in its entirety by agreement of the parties was canceled without any reservation whatsoever on the 15th day of April, 1939.

And for the reasons stated as heretofore indicated you will be instructed to return a general verdict for the plaintiff, of course, on its account, because it is not disputed, and in plaintiff's favor on the defense and on the counterclaim.

....., U. S. District Judge.

DESIGNATION OF ADDITIONAL PORTION OF RECORD.

87 Filed May 4, 1940.

(Title Omitted.)

Comes now The Shamrock Oil and Gas Corporation, complainant, defendant in cross-action, and appellee in the above entitled and numbered cause, and files within the time allowed its designation of additional portions of the record proceedings and evidence to be included in the record on appeal in said cause, and designates the following portions of such record:

1. Notice of intent to file petition for removal, together with receipt of copy of such notice signed by counsel for defendants and petitioners in cross-action;

2. File mark of Clerk of United States District Court on transcript of record from Parmer County, Texas;

3. Opinion rendered by Judge of District Court of United States on the 25th day of September, 1939, and referred to in Order overruling motion to remand entered on 25th day of September, 1939;

88 4. Charge of Court directing jury to return verdict for The Shamrock Oil and Gas Corporation;

5. This designation of additional portions of record.

Wherefore, premises considered, The Shamrock Oil and Gas Corporation, complainant, defendant in cross-action, and appellee, prays that the additional portions of record above designated be included in the record on appeal.

UNDERWOOD, JOHNSON,
DOOLEY AND WILSON,
Attorneys for Complainant,
Defendant in Cross-Action, and Appellee,
By W. M. SUTTON,
Of Counsel.

We, the undersigned, attorneys for appellants, hereby acknowledge receipt of a copy of foregoing designation on this the 4th day of May, 1940.

MONNING & SINGLETON,
By BEN P. MONNING.

89 CLERK'S CERTIFICATE.

United States of America,
Northern District of Texas.

I, GEO. W. PARKER, Clerk of the District Court of the United States for the Northern District of Texas, do hereby certify that the foregoing is a true and complete transcript of the record and proceedings had in said Court in Civil Action No. 73, wherein The Shamrock Oil and Gas Corporation is complainant and G. Obie Sheets and Chester Sheets, doing business as Friona Independent Oil Company, are defendants, as listed in the designations for record filed here, as fully as the same remain on file and of record in my office in the City of Amarillo, Texas. Items Nos. 8 and 12 of Defendants' designation, being Answer of Shamrock Oil & Gas Corporation to Motion to Remand, and Answer of Shamrock Oil & Gas Corporation to Motion for Reconsideration of Court's order overruling motion to remand and motion for new trial, respectively, having never been filed of record in said Civil Action No. 73, do not appear in the transcript of record.

In Testimony Whereof, I have caused the seal of said Court to be hereunto affixed at the City of Amarillo, in the Northern District of Texas, this the 20th day of May, A. D. 1940.

(Seal)

GEO. W. PARKER,
Clerk of United States District Court for the Northern District of Texas,
By MARY K. HARTY,
Deputy.

[fol. 127] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of November 13, 1940

No. 9568

G. OBIE SHEETS and CHESTER SHEETS, Doing Business as Friona Independent Oil Company,

versus

SHAMROCK OIL AND GAS CORPORATION

On this day this cause was called, and, after argument by E. Byron Singleton, Esq., for appellants, and W. M. Sutton, Esq., for appellee, was submitted to the Court.

[fol. 128] OPINION OF THE COURT—Filed December 6, 1940

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 9568

G. OBIE SHEETS and CHESTER SHEETS, Doing Business as Friona Independent Oil Company, Appellants,

versus

SHAMROCK OIL AND GAS CORPORATION, Appellee

Appeal from the District Court of the United States for the Northern District of Texas

(December 6, 1940)

Before Foster, Holmes, and McCord, Circuit Judges

HOLMES, Circuit Judge:

We are met at the threshold of this case with a question of removal jurisdiction. It is whether or not a counterclaim set up by the defendant in a state court, filed by

way of defense and for affirmative relief, is a suit which is [fol. 129] removable by the plaintiff and cross-defendant under Section 28 of the Judicial Code.[1] The court below answered this question affirmatively, and overruled a motion to remand. From a final judgment on the merits in favor of the original plaintiff (appellee here), the defendants who set up the counter-claim have appealed to this court.

The appellee, a Delaware corporation, sued the appellants, citizens of Texas, in the district court of Potter County, Texas, for the sum of $5390.42, alleged to be due the plaintiff upon an open account for the purchase price of goods sold by it to the defendants. At the instance of the defendants, upon a plea of privilege, the action was transferred to the district court of the county of their residence. Then the defendants filed their answer in the state court. It contained a general demurrer and a general denial, but no specific debit items were denied and no additional credit items were alleged; it sought to defeat the entire action on the ground that the contract sued upon was in violation of the anti-trust statutes of Texas, and therefore void. In addition, the defendants filed what they called a set-off and cross-action, whereby they demanded of the plaintiff damages in a sum in excess of three thousand dollars, exclusive of interest and costs. Defendants prayed that, on final hearing, the plaintiff take nothing by its suit against them, and that they have judgment against the said plaintiff on their cross-action.

The damages sought by the defendants against the plaintiff arose at a different time and out of the alleged breach of separate and distinct contracts from the indebtedness due the plaintiff. While the defendants prayed that damages in the sum of $5000 be allowed as a set-off to any claim which the plaintiff might have against them, they denied the validity of any such claim, and finally prayed for a judgment against the plaintiff in the full sum of $7200 and [fol. 130] all costs of suit. We have, then, a case where the plaintiff elected to sue in a state court for more than three thousand dollars, and the defendants not only denied the existence of any such claim, but sought by cross-action to recover damages in the sum of $7200; whereupon, the

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[1] 28 U. S. C. A. 71.

plaintiff and cross-defendant filed a petition to remove the whole suit to the federal court. The question presented depends entirely upon the proper construction of the applicable provision of the present removal statute.[2]

From 1875 to 1887, the right of removal on the ground of diversity of citizenship was given to plaintiffs as well as to defendants. At all other periods since the adoption of the Judiciary Act of 1789, such right was limited to defendants, except under the act of 1867, which applied only to cases where there was the additional ground of prejudice and local influence.[3] At the present time, only the defendant or defendants, being non-residents of the state in which the suit is brought, may remove the suit into the District Court of the United States. In no instance mentioned in said Section 28 is the right of removal expressly conferred upon a plaintiff or cross-defendant.

The removing party here was the plaintiff in the action filed in the state court, and did not become entitled to remove because of set-off or counter-claim was asserted against it by cross-action. The right to remove is given only to a defendant who has not voluntarily submitted himself to the jurisdiction of the state court, "not to an original plaintiff in a State court who, by resorting to that jurisdiction, has become liable under the State law to a cross-action."[4] The decision to this effect, just cited, was under the Judiciary Act of 1789, but the applicable provision thereof was not materially different from the [fol. 131] present statute, the right of removal then and now being given only to the defendant.

In Waco Hardware Company v. Michigan Stove Co., 91 Fed. 289, wherein the plaintiff in the state court sued for less than the federal jurisdictional amount and was met with a counter-claim for a sum greater than such jurisdictional amount, this court refused to read "between the lines of the act" and extend to the plaintiff in a state court a right which, it said, the law clearly intended to give only to the defendant or defendants therein. There are decisions to

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[2] Sec. 28 of the Judicial Code, 28 U. S. C. A. 71.

[3] Act of March 2, 1867, 14 Stat., ch. 196, p. 558.

[4] West v. Aurora City (1867), 6 Wall. 139, 18 L. Ed. 819.

the contrary,[5] but both reason and the weight of authority seem to us to be against allowing the plaintiff to remove because he becomes a cross-defendant in a controversy between citizens of different states having the requisite jurisdictional amount.[6]

The case of Wichita Royalty Company v. City National Bank[7] is cited by appellee to sustain removal. It involved a federal question and not diversity of citizenship. The cross-bill brought in new parties, including the receiver of an insolvent national bank which had closed its doors since the original suit was filed; it might and probably [fol. 132] should have been filed as an independent suit; it certainly should have been characterized as a supplemental cross-bill; but be that as it may, this cross-bill was construed by the district court to be "really a bill to wind

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[5] Carson & Rand Lumber Co. v. Holtzclaw (1889, C. C. Mo.), 39 Fed. 578; Walcott v. Watson (1891, C. C. Nev.), 46 Fed. 529; Price & Hart v. T. J. Ellis & Co. (1904, C. C. Ark.), 129 Fed. 482; Hagerla v. Mississippi River Power Co. (1912, D. C. Iowa), 202 Fed. 771; Hansen v. Pacific Coast Asphalt Cement Co. (1917, D. C. Cal.), 243 Fed. 283, 284; Consolidated Textile Corporation v. Iserson (1923, D. C. N. Y.), 294 Fed. 289; Pierce v. Desmond (1926, D. C. Minn.), 11 F. (2) 327; Zumbrunn v. Schwartz (1927, D. C. Ind.), 17 F. (2) 609; O'Neill Bros. v. Crowley (1938, D. C. S. C.), 24 Fed. Supp. 705; San Antonio Suburban Irrigated Farms v. Shandy (1928, D. C. Kans.), 29 F. (2) 579; Bankers Securities Corporation v. Insurance Equities Corporation (1936, C. C. A. N. J.), 85 F. (2) 856; Chambers v. Skelly Oil Co. (1937, C. C. A. Kans.), 87 F. (2) 853.

[6] West v. Aurora City (1867), 6 Wall. 139, 18 L. Ed. 819; Waco Hardware Co. v. Michigan Stove Co. (1899, C. C. A. Tex.), 91 Fed. 289; McKown v. Kansas & Texas Coal Co. (1901, C. C. Ark.), 105 Fed. 657; Indiana Mountain Jellico Coal Co. v. Asheville Ice & Coal Co. (1905, C. C. N. C.), 135 Fed. 837; Illinois Central Ry. Co. v. A. Waller & Co. (1908, C. C. Ky.), 164 Fed. 358; Glover Mach. Works v. Cooke-Jellico Coal Co. (1915, D. C. Ky.), 222 Fed. 531; Mohawk Rubber Co. v. Terrell (1926, D. C. Mo.), 13 F. (2) 266.

[7] 306 U. S. 103, 95 F. (2) 671, 97 F. (2) 249, 18 Fed. Supp. 609.

up the affairs of the bank."[8] The Circuit Court of Appeals concurred in this construction,[9] and the jurisdictional point was not mentioned by the Supreme Court in its opinion.

Only defendants may remove, either on the ground of a federal question or by reason of diversity of citizenship. In cases of diversity the right is given only to non-resident defendants. In both cases all of the defendants must join in the petition to remove, except where there is a separable controversy wholly between citizens of different states. In all other respects the statutory provisions with reference to removal are substantially the same in cases involving federal questions as in those depending upon diversity of citizenship; and yet the principle which controlled the decision in West v. Aurora City was not overruled by the decision in Wichita Royalty Co. v. City National Bank, supra, because of the distinguishing facts mentioned in the preceding paragraph.

Although directly in point, it is said that West v. Aurora City is an old case which has lost its value by changes in the statute. Exactly the reverse is true; it has gained in value as an authority by the course of legislation on the subject, because the pertinent provision at this time is the same as when that decision was rendered, and the intervening changes, expanding and then contracting the right of removal, emphasize the legislative intent to limit it to [fol. 133] the defendant in the statute in force at the present time.

We have seen that the Aurora City case was decided in 1867, when only defendants were given the right to remove. By the act of 1875, supra, the right to remove was extended to either party, and this act, which repealed the provision

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[8] City National Bank v. Wichita Falls, 18 Fed. Supp. 609, 610.

[9] Upon the matter of winding up the affairs of the old bank, this court said (95 F. (2) 671, 674): "The [United States] District Court has a special jurisdiction of such a case. 28 U. S. C. A. 41(16); International Trust Co. v. Weeks, 203 U. S. 364, 27 Sup. Ct. 69, 51 L. Ed. 224. It has been held indeed that where no other relief is prayed a state court should not exercise jurisdiction. Birdsey v. Commercial National Bank, 143 Ga. 627, 85 S. E. 881."

of the Judiciary Act of 1789 limiting the right of removal to defendants only, necessarily repealed the construction thereof which held that a plaintiff or cross-defendant was not entitled to remove under the act of 1789. The act of 1875, which permitted either the plaintiff or defendant to remove, was repealed by the act of 1887-8,[10] which reenacted the applicable provision of the act of 1789 restricting the right of removal to the defendant or defendants. In readopting that provision, the Congress naturally readopted the construction which had been put upon it in West v. Aurora City, supra. The same provision with the same construction is now a part of Section 28 of the Judicial Code. That interpretation cannot be lightly put aside without violating well-settled rules of statutory construction.

The general purpose of the act of 1887-8, supra, was to contract federal removal jurisdiction; a special purpose was to take away from plaintiffs the right of removal which had been given to them by the act of 1875, supra. This was clearly evidenced by omitting the words "either party" which had been used in the act of 1875, and employing the words "defendant or defendants therein being non-residents of the state." We have, then, this situation: In 1867 the right of removal was limited by statute to non-resident defendants, which statute was held not to include plaintiffs who were also cross-defendants; in 1875 the statute was amended so as to include "either party," which, of course, [fol. 134] embraced plaintiffs whether or not they were also cross-defendants; in 1887 the statute was again amended, omitting the use of the words "either party," and making no reference to plaintiffs or cross-defendants, but expressly limiting the right to non-resident defendants. It would not be reasonable to conclude that Congress reenacted the pertinent provision of the law in force in 1867, and rejected the construction which had been put upon that provision by the Supreme Court at that time. If this had been the intention, it might easily have been expressed by adding the words "cross-defendant or cross-defendants."

The cases which refuse to follow West v. Aurora City because it was under a different law do not mention the

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[10] Act of March 3, 1887, 24 Stat., ch. 373, p. 552; Act of Aug. 13, 1888, 25 Stat., ch. 866, p. 433.

distinguishing features. If they did, it would be observed that there is no material difference on the point before us, and that whatever changes were made in 1887 were made with a view of contracting federal removal jurisdiction. In Mackay v. Uinta Development Company, 229 U. S. 173, 175, the Supreme Court found "it unnecessary to consider the status of the parties in the state court and who was technical plaintiff and who technical defendant, or whether Mackay, a non-resident defendant, sued in a state court for $1,950, could, by filing a counter-claim for $3,000, acquire the right to remove the case to the United States Court."

It is argued that a non-resident plaintiff, by going into a state court, does not waive his right to remove to the federal court when a counter-claim is filed against him. This is not a question of waiver, but of whether or not there was a statutory grant in the first instance; and this is a question of congressional intent. The primary purpose of the act of 1887-8 to cut down jurisdiction was effected by limiting the right of removal to non-resident defendants and by [fol. 135] shortening the time allowed to file the petition to remove.[11]

By the Judiciary Act of 1789, the petition to remove was required to be filed by the defendant at the time of entering his appearance in the state court. By the act of 1875, under which either party was entitled to remove, the filing of the petition was permitted at "any time before the trial or final hearing." By the act of 1887-8, which omitted plaintiffs, the petition was required to be filed by the non-resident defendant at or before the time he was required to plead in the state court. These statutory alterations and refinements reveal no haphazard policy of the Congress; they disclose a definite legislative purpose, at

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[11] That the object was to contract jurisdiction has been emphasized in a number of cases. See Smith v. Lyon, 133 U. S. 315, 320, 10 Sup. Ct. 303, 33 L. Ed. 635; In re Pennsylvania Co., 137 U. S. 451, 454, 11 Sup. Ct. 141, 34 L. Ed. 738; Fisk v. Henarie, 142 U. S. 459, 467, 12 Sup. Ct. 207, 35 L. Ed. 1080; Hanrick v. Hanrick, 153 U. S. 192, 197, 14 Sup. Ct. 835, 38 L. Ed. 685.

different periods in our history, first of expanding and then of contracting federal removal jurisdiction.[12]

Section 28 of the Judicial Code names the persons entitled to remove; section 29 provides how any person entitled to remove may exercise the right. He may file a petition in the state court at or before the time the defendant is required to plead or answer. This provision contemplates the defendant, not the plaintiff, as the party entitled to remove. No time is fixed within which a plaintiff or cross-defendant may petition to remove. In actual practice, the time limit upon filing the petition to remove, designed only for defendants, would generally deny that right to plaintiffs who are made cross-defendants. We should not ascribe to the Congress an implied intention to [fol. 136] accord to cross-defendants a right to remove when the statute under consideration contains a procedural provision which shows that the exercise of such right by plaintiffs and cross-defendants was not within the legislative contemplation at the time of the enactment.

The judgment appealed from is reversed, and the cause remanded to the district court with instructions to remand the same to the state court from which it was removed.

[fol. 137] JUDGMENT

Extract from the Minutes of December 6, 1940

No. 9568

G. OBIE SHEETS and CHESTER SHEETS, Doing Business as Friona Independent Oil Company,

versus

SHAMROCK OIL AND GAS CORPORATION

This cause came on to be heard on the transcript of the record from the District Court of the United States for

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[12] See also Act of July 27, 1866, 14 Stat. 306; Act of March 2, 1867, 14 Stat. 558. These were special statutes which broadened the jurisdiction, and permitted the petition for removal to be filed at any time before the trial or final hearing of the cause; the act of 1866 permitted only the defendant to remove, but that act was amended by the act of 1867, which extended the right of removal to either plaintiff or defendant in cases of prejudice or local influence.

the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered, and adjudged by this Court, that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with instructions to remand the same to the state court from which it was removed;

It is further ordered and adjudged that the appellee, Shamrock Oil and Gas Corporation, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

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[fols. 138-146] PETITION FOR REHEARING—Filed December 26, 1940

IN THE

United States Circuit Court of Appeals

FIFTH CIRCUIT.

No. 9568.

G. OBIE SHEETS AND CHESTER SHEETS, DOING BUSINESS AS FRIONA INDEPENDENT OIL COMPANY, APPELLANTS,

VS.

THE SHAMROCK OIL AND GAS CORPORATION, APPELLEE.

APPEALED FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, AMARILLO DIVISION.

APPELLEE'S PETITION FOR REHEARING.

Appellee, The Shamrock Oil and Gas Corporation, respectfully petitions for a rehearing of the above entitled and numbered cause, and prays that upon such rehearing the decision and judgment of this Honorable Court in these proceedings rendered on the 6th day of December, 1940, be set aside, and that the judgment and action of the trial court be affirmed. As grounds for such rehearing appellee submits:

GROUND NO. I.

The decision of this Honorable Court, rendered on the 6th day of December, 1940, in holding, that the original plaintiff in an action filed in a state court does not become a defendant in a cross action or counterclaim filed by the original defendant, which cross action involves a transaction entirely separate and distinct from and arising at a different time than the indebtedness sued upon by the original plaintiff, and that such defendant in the cross action or counterclaim is not a defendant entitled to remove such cross action or counterclaim to the Federal Courts under the removal statute now in force on the ground of diversity of citizenship and jurisdictional amount, is contrary to and in conflict with the numerical weight of authority, including the following cases, to-wit:

Bankers Securities Corporation v. *Insurance Equities Corporation,* (C. C. A. 3rd Circuit N. J. 1936), 85 Fed. (2d) 856.

Chambers v. *Skelly Oil Co.,* (C. C. A. 10th Cir. 1937), 87 Fed. (2d) 853.

Wichita Royalty Co. v. *City National Bank,* (D. C. Tex.), 18 F. Supp. 609, Affirmed (C. C. A. 5th Cir. 1938), 95 Fed. (2d) 671, 306 U. S. 103, 83 L. Ed. 515.

Carson and Rand Lumber Co. v. *Holtzclaw,* (D. C. Mo. 1889), 39 Fed. 578.

Walcott v. *Watson,* (C. C. Nev. 1891), 46 Fed. 529.

Price & Hart v. *I. J. Ellis & Co.,* (C. C. Ark. 1904), 129 Fed. 482.

Hagerla v. *Mississippi River Power Co.,* (C. C. Iowa 1912), 202 Fed. 771.

Hansen v. *Pacific Coast Asphalt Cement Co.*, (D. C. Calif. 1917), 243 Fed. 283.

Chicago, M. & St. P. Ry. Co. v. *City of Spencer*, (D. C. Iowa 1922), 283 Fed. 824.

Consolidated Textile Corporation v. *Iserson*, (D. C. N. Y. 1923), 294 Fed. 289.

Pierce v. *Desmond*, (D. C. Minn. 1926), 11 Fed. (2d) 327.

Mohawk Rubber Co. of New York v. *Terrell*, (D. C. Mo. 1926), 13 Fed. (2d) 266.

Zumbrunn v. *Schwartz*, (D. C. Ind. 1927), 17 Fed. (2d) 609.

San Antonio Suburban Irrigated Farms v. *Shandy*, (D. C. Kan. 1928), 29 Fed. (2d) 579.

Evetts v. *Peoples Life Insurance Co.*, (D. C. Tex. 1929), 36 Fed. (2d) 832.

American Fruit Growers, Inc. v. *La Roche*, (D. C. S. C. 1928), 39 Fed. (2d) 243.

Groveville Sales Corporation v. *Stevens*, (D. C. N. J. 1936), 16 Fed. Supp. 563.

O'Neill Bros., Inc. v. *Crowley*, (D. C. S. C. 1938), 24 F. Supp. 705.

Baker v. *Keebler*, (D. C. Tenn. 1939), 29 F. Supp. 555.

Mason City & Ft. Dodge Ry. Co. v. *Boynton*, 204 U. S. 570, 51 L. Ed. 629, 27 S. Ct. 321.

Merchants Heat & Light Co. v. *James B. Clow & Sons*, 204 U. S. 286, 51 L. Ed. 488.

GROUND NO. II.

This Honorable Court erred in holding that the decision in the case of *West* v. *City of Aurora*, (1867, 6 Wall 139, 18 Leb. 819) is decisive of this case, and erred in holding that there is no difference in the removal act of 1789 under which the West case was decided and the present removal statute, for the following reasons:

(a) The removal act of 1789 provided that

"* * * the defendant shall, *at the time of entering his appearance in such state court,* file a petition for the removal of the cause for trial into the next circuit court * * *." (Italics our own). Section 12, 1 Stat. 79, historical note 28, U. S. C. A. Section 71.

The decision in the West case strictly followed such statute as indicated by the statement in the West case, "that the right of removal is given only to a defendant who has not submitted himself to the jurisdiction"; whereas the statute now in force contains no such provision above quoted and accords the right of removal to the "defendant or defendants therein, being non residents of that state", 28 U. S. C. A. Section 71, and as pointed out in a number of the cases cited under the preceding ground such term "defendant" or "defendants" can be applied to and includes a defendant in a cross action or counterclaim.

(b) The so-called cross action filed in the case of *West* v. *The City of Aurora,* as pointed out in the opinion of the Supreme Court, set up defensive matters and was in the nature of a defensive plea coupled with a prayer for an injunction and involved matters or transactions interrelated with the cause of action originally sued upon, and the so-called cross action was not a suit, or at least not such a suit as could be removed; while in the instant case the cross action or counterclaim filed by the appellants in the state court stated a new, separate and distinct cause of action occurring at a different time and entirely unrelated to the indebtedness sued upon by the original plaintiff. The cross action or counterclaim in the instant case was a suit which could have been independently filed and tried in a separate and distinct proceedings, and in such cross action or counterclaim the original defendants became plaintiffs and actors as to such cross action, and the original plaintiff became a defendant as to such cross action under controlling Texas and Federal decisions (see cases cited under Counter

Proposition Two in Brief of Appellee heretofore filed herein).

GROUND NO. III.

Appellee respectfully submits that the opinion and decision in the instant case is in conflict with the prior opinion and decision of this Court in the case of *Wichita Royalty Company* v. *City National Bank of Wichita Falls*, (C. C. A. 5th Cir. 1938), 95 Fed. (2d) 671, which affirmed the decision of the trial court, 18 F. Supp. 609, and which case was subsequently passed upon by the Supreme Court of the United States without referring to the jurisdictional question and without in anywise questioning the decision of this Court to the effect that such case was properly removed, 306 U. S. 103, 83 L. Ed. 515; and it is further respectfully submitted that the instant case is not distinguishable in principle from the Wichita Royalty Company case for the following reasons:

It is true that the Wichita Royalty case involved a cross action or cross bill presenting a Federal question, while the cross action or counterclaim in the instant case involves diversity of citizenship and jurisdictional amount. It is true that the cross bill in the Wichita Royalty case brought in new parties, but the decision of this Honorable Court reflects that the portion of the cross action or cross bill relied upon as presenting a suit involving a Federal question was that part of the cross bill that sought the winding up of the affairs of the old bank, the party that originally instituted the suit; the old bank, that is, the original plaintiff, joined with the new parties in removing the case to the Federal Court. Hence the Wichita Royalty Company case involved a cross action or cross bill presenting a matter unrelated to the original suit, just as in the present case the cross action or counterclaim presents a cause of action arising at a different time and growing out of an entirely separate and distinct transaction from the indebtedness originally sued upon. What is said in the opinion in the instant case relative to the cross bill in

the Wichita Royalty case, to-wit; "* * * it might and probably should have been filed as an independent suit * * *", is equally true and applicable to the cross action or counterclaim here involved. In the instant case, as in the Wichita Royalty case, all of the defendants in the cross action removed the case; the only distinguishing feature in the two cases being that in one case the ground for removal was the Federal question, and in the other case the ground for removal was diversity of citizenship. The cross action in each of the cases presented a cause of action independent of and unrelated to the matter originally sued upon, and in each case the original plaintiff, who became the defendant as to such independent matters so presented in the respective cross actions, removed, or participated in the removal of the case. In the present case, as in the Wichita Royalty case, the removal of the cross action carried with it the matters presented in the original suit.

GROUND NO. IV.

The decision of this Honorable Court that the appellee herein was not a defendant within the meaning and intent of the present removal statute, and was, therefore, not entitled to remove the cause of action presented in the counterclaim or cross action, even though, as recognized in the opinion of this Court, the damages sought in the cross action or counterclaim arose at a different time and out of the alleged breach of a separate and distinct contract from the indebtedness originally sued upon, is contrary to and in conflict with the established line of decisions of the Federal Courts that under the removal act of 1875 and subsequent removal acts, including the present removal statutes, that the real matter in controversy should be ascertained and the parties realigned without regard to the name or designation assigned such parties in the pleadings. The decision in the instant case conflicts, in such regard, with the following decisions, reaffirming the rule relating to realignment of parties and applying same to identical or similar fact situations to the one here involved:

Removal Cases, (1879), 100 U. S. 457, 25 L. Ed. 593.

Brown v. *Ironsdale,* (1891), 138 U. S. 389, 11 Sup. Ct. 308, 34 L. Ed. 987.

Wilson v. *Oswego Township,* (1894), 151 U. S. 56, 63, 14 Sup. Ct. 259, 38 L. Ed. 70.

Merchants Cotton Press & Storage Co. v. *The Insurance Company of North America,* (1894), 151 U. S. 368, 385, 14 S. Ct. 367, 38 L. Ed. 195, 204.

Merchants Heat & Light Co. v. *James B. Clow & Sons,* (1907), 204 U. S. 286, 27 S. Ct. 285, 51 L. Ed. 488.

Mason City & Fort Dodge R. R. Co. v. *Boynton,* (1907), 204 U. S. 570, 27 S. Ct. 321, 51 L. Ed. 629.

Venner v. *Great Northern Railway Company,* (1908), 209 U. S. 24, 28 S. Ct. 328, 52 L. Ed. 666.

Niles-Bennett-Pond Co. v. *Iron Moulders Union,* (1920), 254 U. S. 77, 41 S. Ct. 39, 65 L. Ed. 145.

Harrison v. *Harrison,* (D. C. Miss. 1922), 5. F. (2d) 1001.

Zumbrunn v. *Schwartz,* (D. C. Ind. 1927), 17 F. (2d) 609.

O'Neill Bros. v. *Crowley,* (D. C. S. C. 1938), 24 F. Sup. 705.

GROUND NO. V.

In applying a strict construction to the words "defendant" or "defendants" used in the removal statute and in holding that such terms do not include a cross defendant or a plaintiff who becomes a defendant in a cross action involving an entirely new cause of action, the decision of this Honorable Court, when carried to its logical conclusion, is in conflict with that line of de-

cisions permitting a defendant brought in by a cross bill to remove the action to the Federal Court, of which line of authorities the following cases are examples:

Habermel v. *Mong,* (C. C. A. 6th Cir. 1929), 31 F. (2d) 822. Writ of Cert. denied 280 U. S. 587, 50 S. Ct. 37, 74 L. Ed. 636.

Ellis v. *Peak,* (D. C. Tex. 1938), 22 F. Supp. 908.

GROUND NO. VI.

In applying a strict construction to Section 29 of the Judicial Code, being the procedural statute governing the right of removal, the opinion of this Honorable Court conflicts with the decision of the Supreme Court in *Powers* v. *Chesapeake and Ohio Ry. Co.,* 169 U. S. 92, 42 L. Ed. 673, which decision requires a reasonable construction of the act; and the opinion herein, in holding that the provisions in such section of the Judicial Code relative to the time that the petition for removal must be filed prevents a removal by anyone except an original defendant, conflicts with the decisions cited under Ground No. I and Ground No. V hereof, which hold, in so far as such cross action or cross bill is concerned, that the time for filing such petition for removal is at or before the time the defendant in the cross action or cross bill is required to answer such cross action or cross bill.

GROUND NO. VII.

This Honorable Court erred in holding that it had jurisdiction of the appeal of this case as being an appeal from a final judgment, for the reason that the transcript of the record reflects that no appeal was taken from the final judgment on the merits rendered on the 13th day of October, 1939, (Tr. 81), or from the order overruling the motion for new trial (Tr. 93), but upon the contrary, the notice of appeal (Tr. 95), appellants' application for leave to appeal (Tr. 101), and the order allowing an appeal (Tr. 103) reflect that the appeal in this case was

taken from the trial court's order overruling the appellants' motion to remand, and from the order of the Court overruling the motion for a reconsideration of the Court's order overruling defendant's motion to remand. Such orders are not final judgments from which an appeal may be taken.

Bender v. *The Pennsylvania Company,* 148 U. S. 502, 13 S. Ct. 640, 37 L. Ed. 537.

Arthur v. *Edmunds,* (C. C. A. Fifth Circuit), 66 Fed. (2d) 21.

Lockhart v. *New York Life Insurance Co.,* (C. C. A. Fourth Circuit), 71 Fed. (2d) 684.

Klein v. *Wilson & Co.,* (C. C. A. Third Circuit), 7 Fed. (2d) 777.

WHEREFORE, for all of the reasons and grounds heretofore assigned, appellee petitions and prays that a rehearing of this cause be granted, and that upon such rehearing the decision and judgment rendered by this Honorable Court in these proceedings on the 6th day of December, 1940, be reversed and set aside, and the judgment and action of the trial court be in all things affirmed.

Respectfully submitted.

.....

Of Counsel.

R. E. Underwood,
R. C. Johnson,
J. B. Dooley,
R. A. Wilson,
W. M. Sutton,
All of Amarillo, Texas,
Attorneys for Appellee.

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[fol. 147] ORDER DENYING REHEARING

Extract from the Minutes of January 14, 1941

No. 9568

G. OBIE SHEETS and CHESTER SHEETS, Doing Business as Friona Independent Oil Company,

versus

SHAMROCK OIL AND GAS CORPORATION

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 148] MOTION AND ORDER STAYING MANDATE—Filed January 18, 1941

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 9568

G. OBIE SHEETS and CHESTER SHEETS, Doing Business as Friona Independent Oil Company, Appellants

vs.

THE SHAMROCK OIL AND GAS CORPORATION, Appellee

Appeal from the District Court of the United States for the Northern District of Texas

Petition of The Shamrock Oil and Gas Corporation, Appellee, for an Order Staying the Issuance of the Mandate, Execution and Enforcement of the Judgment of the United States Circuit Court of Appeals for the Fifth Circuit to Enable Said The Shamrock Oil and Gas Corporation to Apply for and Obtain Writ of Certiorari from the Supreme Court

To the Honorable United States Circuit Court of Appeals for the Fifth Circuit or Any Judge Thereof:

Your Petitioner, The Shamrock Oil and Gas Corporation, respectfully presents this its application for a stay of the

mandate and the execution and enforcement of the judgment of the Honorable United States Circuit Court of Appeals for the Fifth Circuit rendered in the above cause on the 6th day of December, 1940, to enable petitioner to apply for and obtain a writ of certiorari from the Supreme Court of the United States and as grounds therefor shows as follows:

The judgment of the Honorable United States Circuit Court of Appeals for the Fifth Circuit was rendered on the 6th day of December, 1940, and thereafter within twenty-one days after the date of such decision and on the 26th [fol. 149] day of December, 1940, the appellee, The Shamrock Oil and Gas Corporation, filed with the Clerk of said Court its petition for rehearing, which petition for rehearing was thereafter denied by this Honorable Court by an order entered on the 14th day of January, 1941.

Petitioner shows that it is the bona fide intention of the appellee to make proper application to the Supreme Court of the United States for writ of certiorari in this case within the time provided by law and in support hereof appellee attaches the professional statement of its counsel, W. M. Sutton, of Amarillo, Texas.

Petitioner shows that if it should be determined that as a condition to the granting of this application for the stay of the issuance of mandate, execution and enforcement of judgment, that the appellee be required to give security, conditioned that should it fail to make application for such writ within the period allotted therefor or fail to obtain an order granting its application or fail to make its plea good in the Supreme Court, that it will answer for all damages and costs which the appellants may sustain by reason of the stay, that appellee stands ready to make such security, if so required, in such amount as it may be required.

Wherefore, premises considered, petitioner prays that order staying the mandate, execution and enforcement of judgment be entered and that the issuance of mandate, execution and enforcement of judgment be stayed for a period of sixty days from this date or for a lesser period, if it should be determined that a lesser period is sufficient, and if the application for writ of certiorari is filed within such period that the issuance of mandate, execution and

enforcement of judgment be further stayed until such ap-
[fol. 150] plication is finally determined.

Respectfully submitted, W. M. Sutton, of Counsel.
R. E. Underwood, R. C. Johnson, J. B. Dooley,
R. A. Wilson, W. M. Sutton, all of Amarillo, Texas.
Attorneys for Appellee.

CERTIFICATE OF COUNSEL

I, W. M. Sutton, counsel for The Shamrock Oil and Gas Corporation, appellee, certify that it is the bona fide intention of the appellee, The Shamrock Oil and Gas Corporation, to make application to the Supreme Court of the United States for writ of certiorari within the time allowed by law and that I believe there is merit in this case and the judgment of the United States Circuit Court of Appeals ought to be reversed by the Supreme Court of the United States.

W. M. Sutton.

[fol. 151] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT

No. 9568

G. OBIE SHEETS and CHESTER SHEETS, Doing Business as Friona Independent Oil Company, Appellants,

versus

SHAMROCK OIL AND GAS CORPORATION, Appellee

On consideration of the application of the Appellee in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court

the certificate of the clerk of the Supreme Court that certiorari petition, and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 18th day of January, 1941.

(Signed) E. R. Holmes, United States Circuit Judge.

[fol. 152] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 153] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 10, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, limited to the first question presented by the petition for the writ.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 727

THE SHAMROCK OIL AND GAS CORPORATION,
Petitioner,

vs.

G. OBIE SHEETS AND CHESTER SHEETS, DOING BUSINESS AS FRIONA INDEPENDENT OIL COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

R. C. JOHNSON,
JOSEPH B. DOOLEY,
R. E. UNDERWOOD,
R. A. WILSON,
W. M. SUTTON,
Counsel for Petitioner.

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Cases Cited.

STATUTES CITED.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 727

THE SHAMROCK OIL AND GAS CORPORATION,
Petitioner,

vs.

G. OBIE SHEETS AND CHESTER SHEETS, DOING BUSINESS AS FRIONA INDEPENDENT OIL COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, The Shamrock Oil and Gas Corporation, a corporation organized under the laws of the State of Delaware, prays this Court for the issuance of a writ of certiorari to review a final judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered on

the 6th day of December, 1940, reversing a decree of the United States District Court for the Northern District of Texas, Amarillo Division, and remanding this case to the United States District Court for the Northern District of Texas with instructions to remand same to the State Court from which it was removed.

Statement of the Matter Involved.

The matter involved herein is a question of removal jurisdiction and the proper construction of the removal statute, being Section 28 of the Judicial Code as Amended (28 U. S. C. A. Section 71). It was held by the Honorable Circuit Court of Appeals for the Fifth Circuit (R. 127) that the petitioner was not entitled under the removal statute as the cross-defendant in a counterclaim or cross-action to remove the counterclaim to the Federal Court, the basis of such decision being that since the petitioner had been the original plaintiff, it was not a defendant within the meaning of the statute referred to.

The petitioner, a Delaware corporation, sued the respondents in the District Court of Potter County, Texas, on an account for petroleum products sold respondents in the amount of $5,390.42 (R. 1 to 60). On the filing of a plea of privilege by respondents (R. 61) the venue of such suit was transferred to the District Court of Parmer County, Texas (R. 62-63). The respondents filed their original answer in the District Court of Parmer County, Texas (R. 64), and in such answer filed their cross-action or counterclaim (R. 67-68), wherein respondents, citizens of Texas, sought to recover damages in amount of $7,200.00 for the alleged breach of contracts relative to the leasing of an automobile truck, which contracts were separate, distinct and unrelated to the indebtedness originally sued upon. Petitioner, as defendant in the cross-action, filed its petition for removal and removed the cause to the United States

District Court for the Northern District of Texas, Amarillo Division (R. 69 to 76), on the grounds (R. 69 to 70) that the cross-action presented a separate and distinct suit by respondents, citizens of Texas, against petitioner, a citizen of Delaware, for $7,200.00 damages. Respondents moved to remand (R. 76), which motion was denied (R. 80), and an unreported opinion of the Trial Court was rendered (R. 108) in open court. After trial on merits and judgment for petitioner was rendered on both the original suit and counterclaim (R. 81), respondents filed a motion for reconsideration of their motion to remand (R. 85 to 93), which motion was overruled by the Trial Court (R. 93). Respondents appealed to the United States Circuit Court of Appeals for the Fifth Circuit from the order overruling their motion to remand and from the judgment of the court overruling respondents' motion for a reconsideration of the court's order overruling motion to remand (R. 103 to 107).

The United States Circuit Court of Appeals entered its judgment on the 6th day of December, 1940, reversing the judgment appealed from and remanded this cause to the Trial Court with instructions to remand same to the State Court from which it was removed (R. 134). An opinion in this cause was filed by the Circuit Court of Appeals on the 6th day of December, 1940 (R. 127), 115 F. (2d) 880, in which it was held that Section 28 of the Judicial Code as Amended (28 U. S. C. A. Section 71) does not permit the removal of a cross-action or counterclaim for more than $3,000.00 involving the alleged breach of contracts distinct and separate from the indebtedness originally sued upon, at the instance of a non-resident cross-defendant, if such party had been the original plaintiff in the State Court. The petitioner filed its petition for rehearing on the 26th day of December, 1940 (R. 136), which petition was denied by a judgment entered on the 14th day of January, 1941 (R. 145).

Basis of Jurisdiction.

The judgment sought to be reviewed is the judgment of the United States Circuit Court of Appeals for the Fifth Circuit rendered on the 6th day of December, 1940 (R. 134) reversing the judgment of the United States District Court for the Northern District of Texas, Amarillo Division, and remanding this case to such court with instructions to remand same to the State Court from which it was removed. The nature of the case presented is fully set out in the preceding statement of the matter involved, but is one involving a question of removal jurisdiction and the proper construction of Section 28 of the Judicial Code as Amended (28 U. S. C. A. Section 71). The unreported oral opinion (R. 108) of the District Judge for the United States District Court for the Northern District of Texas reflects the judgment of the Trial Court to the effect that this cause was properly removed to the Federal Court by the petitioner. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit filed on the 6th day of December, 1940 (R. 128) 115 F. (2d) 880 reflects the decision of said court to be that Section 28 of the Judicial Code does not permit the removal of this case by the petitioner from the State Court to the Federal Court. Petition for rehearing was filed on the 26th day of December, 1940 (R. 136) and same was denied on the 14th day of January, 1941 (R. 145). Petition for writ of certiorari is presented herein on the 30th day of January, 1941.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as Amended by the Act of February 13, 1925, c. 229, Section 1, (43 Stat. 938) (28 U. S. C. A. Section 347). The jurisdiction of this honorable Court under such statute to review by certiorari a judgment of a Circuit Court of Appeals remanding a case to the District Court with instructions to remand to the State Court from which it was removed, such as is here

involved, was sustained in *Gay* v. *Ruff*, 292 U. S. 25, 54 S. C. 608, 78 L. Ed. 1099. Such holding was referred to and reaffirmed in *Employers Reinsurance Corporation* v. *Bryant*, (Note 9) 299 U. S. 374, 57 S. C. 273, 81 L. Ed. 289.

Questions Presented.

I.

The primary question presented is:

> Whether a counter-claim or cross-action, set up by resident defendants in a State Court seeking damages against the original non-resident plaintiff in the amount of $7,200.00 for the alleged breach of a separate and distinct contract from the $5,390.42 indebtedness due on open account and originally sued upon, is a suit which is removable by the defendant in the cross-action (petitioner), who had been the original plaintiff, on the grounds of diversity of citizenship under Section 28 of the Judicial Code as Amended (28 U. S. C. A. Section 71)?

II.

A second question is presented in this case, but petitioner does not claim that this question alone would warrant the granting of a writ of certiorari, but same is presented for the Court's consideration and so that it may be properly preserved:

> Whether the order or judgment of the Trial Court overruling respondents' motion for a reconsideration of the Trial Court's previous order overruling motion to remand, which motion to reconsider was filed after final judgment on merits had been entered, is such a final judgment as would authorize the appeal by respondents to the United States Circuit Court of Appeals, Fifth Circuit?

Reasons Relied on for the Allowance of the Writ.

Reasons I to III hereafter are referable to Question No. I.

Reason I.

The judgment and decision of the Circuit Court of Appeals herein, to the effect that the petitioner was not entitled to remove the cross-action of respondents to the Federal court, even though the cross-action admittedly sought affirmative relief for damages totaling $7,200.00 for breach of contracts unrelated to the original suit, for the reason that Section 28 of the Judicial Code as Amended (28 U. S. C. A. Section 71) grants the right to remove a suit to the original defendants only, and that such a cross-action was not a suit within such statute, conflicts with prior decisions (hereafter cited) of other Circuit Courts of Appeals and with a prior decision of the Circuit Court of Appeals for the Fifth Circuit. The Circuit Court of Appeals in its opinion herein acknowledges that its decision and holding upon such point is in conflict with the following prior decisions of other Circuit Courts of Appeals and District Courts (R. 129-130): *Bankers Securities Corporation* v. *Insurance Equities Corporation* (1936, C. C. A. N. J. Third Circuit) 85 F. (2d) 856; *Chambers* v. *Skelly Oil Company* (1937, C. C. A. Kans. Tenth Circuit) 87 F. (2d) 853; *Carson & Rand Lumber Co.* v. *Holtzclaw* (1889, C. C. Mo.), 39 Fed. 578; *Walcott* v. *Watson* (1891, C. C. Nev.), 46 Fed. 529; *Price & Hart* v. *T. J. Ellis & Co.* (1904, C. C. Ark.), 129 Fed. 482; *Hagerla* v. *Mississippi River Power Co.* (1912, D. C. Iowa), 202 Fed. 771; *Hansen* v. *Pacific Coast Asphalt Cement Co.* (1917, D. C. Cal.), 243 Fed. 283, 284; *Consolidated Textile Corporation* v. *Iserson* (1923, D. C. N. Y.), 294 Fed. 289; *Pierce* v. *Desmond* (1926, D. C. Minn.), 11 F. (2d) 327; *Zumbrunn* v. *Schwartz* (1927, D. C. Ind.), 17 F. (2d) 609; *O'Neill Bros.* v. *Crowley* (1938, D. C. S. C.), 24

Fed. Supp. 705; *San Antonio Suburban Irrigated Farms* v. *Shandy* (1928, D. C. Kans.), 29 F. (2d) 579. Petitioner further submits that the holding of the honorable Circuit Court of Appeals for the Fifth Circuit in the case of *Wichita Royalty Company* v. *City National Bank* (1938, C. C. A. Tex. Fifth Circuit) 95 F. (2d) 671, 97 F. (2d) 249, (1937, D. C. Tex.) 18 Fed. Supp. 609 (affirmed without reference to question of removal jurisdiction, 306 U. S. 103, 83 L. Ed. 515, 59 S. C. 420), conflicts with the decision and holding of the Circuit Court of Appeals in this case, though same was sought to be distinguished by the Circuit Court of Appeals herein from the instant case on the grounds that the basis for removal therein was a Federal question and not diversity of citizenship.

Reason II.

The honorable Circuit Court of Appeals has decided an important question of Federal law involving the proper construction of a Federal statute, to-wit, Section 28 of Judicial Code as Amended (28 U. S. C. A. Section 71), which question has not been, but should be, settled by the Supreme Court. Since the enactment of Section 28 of the Judicial Code (28 U. S. C. A. Section 71) in substantially its present form by the Judiciary Acts of 1887 and 1888 (Act of March 3, 1887, 24 Stat., Ch. 373, p. 522; Act of August 13, 1888, 25 Stat., Ch. 866, p. 433) more than twenty-five reported cases have passed upon the question of the right of a defendant in a cross-action or counter-claim filed in a State Court seeking affirmative relief to remove such counter-claim or cross-action to the Federal Courts. These cases, many of which are cited under Point I of brief which follows are in hopeless conflict and the holdings therein diametrically opposed upon such question. The Supreme Court of the United States has not passed upon such question under the act of 1887 (Act of March 3, 1887, 24 Stat.,

Ch. 373, p. 552) and its amendments. The case of *West* v. *Aurora City* (1867), 73 U. S. 193, 6 Wall. 139, 18 L. Ed. 819, decided under the Judiciary Act of 1789 (Act of September 24, 1789, c. 20, 1 Stat. 73) is cited by the Circuit Court of Appeals for the Fifth Circuit in the instant case as being controlling on the question presented, and on the construction of the present removal statute. In so holding the decision of the honorable Circuit Court of Appeals conflicts with the decisions in the following cases in which it was held that the case of *West* v. *Aurora City, supra,* is not applicable to the present removal statute because of difference in the language of the two acts, or that such decision is distinguishable upon other grounds upon the question here presented. The cases so holding are: *Habermel* v. *Mong* (1929, C. C. A. Sixth Circuit, Tenn.), 31 f. (2d) 822 (writ of certiorari denied *Habermel* v. *Mong* [1929] 280 U. S. 587, 74 L. Ed. 636, 30 S. C. 37); *San Antonio Suburban Irrigated Farms* v. *Shandy* (1928, D. C. Kan.), 29 F. (2d) 579; *O'Neill Bros.* v. *Crowley* (1938, D. C. S. C.), 24 Fed. Supp. 705; *Zumbrunn* v. *Schwartz* (1927, D. C. Ind.), 17 F. (2d) 609; *Price & Hart* v. *T. J. Ellis & Co.* (Cir. Co. Ark. 1904), 129 Fed. 482; *Ward* v. *Congress Construction Company* (1900, C. C. A. Seventh Circuit), 99 Fed. 598; *Pierce* v. *Desmond* (1926, D. C. Minn.), 11 F. (2d) 327; *Hagerla* v. *Mississippi River Power Company* (1912, D. C. Iowa), 202 Fed. 771; *Walcott* v. *Watson* (1891, Cir. C. Nev.), 46 Fed. 529. The Circuit Court of Appeals recognizes in its opinion (R. 132-133) that such conflict exists.

Reason III.

The honorable Circuit Court of Appeals, in holding, as it did in the instant case, that the petitioner, having been the original plaintiff in the State Court, was not entitled under Section 28 of the Judicial Code as Amended (28 U. S. C. A. Section 71), to remove the cross-action filed by

the respondents to the Federal Court, has decided a Federal question involving the proper construction of such statute in a way that conflicts with the applicable decisions of the Supreme Court in the cases of *Merchant's Heat and Light Company* v. *James B. Clow & Sons* (1907) 204 U. S. 286, 51 L. Ed. 488, 27 S. C. 285, and *W. S. Kirby* v. *American Soda Fountain Company* (1904) 194 U. S. 141, 48 L. Ed. 911, 24 S. C. 619, which cases recognize that when an original defendant files a cross-action or counter-claim the original defendant becomes as to such cross-action the actor or plaintiff and the original plaintiff becomes as to such cross-action or counter-claim the defendant. The opinion and holding of the Circuit Court of Appeals herein likewise conflicts with the following applicable decisions of the Supreme Court, which hold that under the Judiciary Act of 1887 and 1888 in determining the right of removal the parties should be realigned in accordance with the matter in dispute, and without regard to the position they occupy in the pleadings as plaintiff or defendant: *Removal Cases,* (1879), 100 U. S. 457, 25 L. Ed. 593; *Brown* v. *Ironsdale,* (1891), 138 U. S. 389, 11 S. C. 308, 34 L. Ed. 987; *Wilson* v. *Oswego Township* (1894), 151 U. S. 56, 63, 14 S. C. 259, 38 L. Ed. 70; *Merchants Cotton Press & Storage Co.* v. *The Insurance Company of North America* (1894), 151 U. S. 368, 385, 14 S. C. 367, 38 L. Ed. 195, 204; *Mason City & Fort Dodge R. R. Co.* v. *Boynton* (1907), 204 U. S. 570, 27 S. C. 321, 51 L. Ed. 629; *Venner* v. *Great Northern Railway Company* (1908), 209 U. S. 24, 28 S. C. 328, 52 L. Ed. 666; *Niles-Bennett-Pond Co.* v. *Iron Moulders Union* (1920), 254 U. S. 77, 41 S. C. 39, 65 L. Ed. 145.

Reason IV hereafter is referable to Question No. II.

Reason IV.

In entertaining the appeal of respondents from an order of the District Court overruling a motion for reconsidera-

tion of motion to remand, which motion to reconsider was filed subsequent to the rendition of judgment on the merits in the Trial Court, the Circuit Court of Appeals held in effect that such order of the District Court was a final judgment from which an appeal might be taken to the Circuit Court of Appeals. Such action upon the part of the honorable Circuit Court of Appeals is in conflict with the holdings in the following cases to the effect that an appeal can not be taken from an order overruling a motion to remand: *Bender* v. *The Pennsylvania Company,* 148 U. S. 502, 13 S. C. 640, 37 L. Ed. 537; *Arthur* v. *Edmunds* (C. C. A. Fifth Circuit) 66 F. (2d) 21; *Lockhart* v. *New York Life Insurance Co.* (C. C. A. Fourth Circuit), 71 F. (2d) 684; *Klein* v. *Wilson & Co.* (C. C. A. Third Circuit), 7 F. (2d) 777.

Conclusion.

Wherefore, for the reasons herein advanced, it is respectfully submitted that the Supreme Court should exercise its jurisdiction to review by writ of certiorari the judgment of the Circuit Court of Appeals to the end that an important question of Federal law involving the construction of a Federal statute relating to removal jurisdiction be settled and an end be put to the conflict in the decisions of the various Circuit Courts of Appeals and other inferior coufts.

Respectfully submitted,

R. C. Johnson,
Joseph B. Dooley,
R. E. Underwood,
R. A. Wilson,
W. M. Sutton,
All of Amarillo, Texas,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of Courts Below.

The unreported oral opinion of the United States District Court for the Northern District of Texas, rendered in open court, when motion to remand was overruled, appears at Page 108 of Record.

The opinion of the United States Circuit Court of Appeals, Fifth Circuit, rendered on December 6th, 1940, appears at Page 127 of Record and is reported in 115 F. (2d) at Page 880.

Grounds on Which Jurisdiction is Invoked.

A statement of grounds of jurisdiction is contained in the petition. The judgment of the United States Circuit Court of Appeals (R. 134) reversed the judgment of the District Court and remanded this case to the District Court with instructions to remand to the State Court from which it was removed. Such judgment of the Circuit Court of Appeals was entered on the 6th day of December, 1940 (R. 134). A petition for rehearing was filed December 26, 1940 (R. 136) and same was denied January 14th, 1941 (R. 145). Petition for certiorari is presented herein on the 30th day of January, 1941. Jurisdiction is invoked under Section 240 (a) of the Judicial Code as Amended by Act of February 13, 1925, c. 229, Section 1 (43 Stat., 938; 28 U. S. C. A. Section 347). The case of *Gay* v. *Ruff*, 292 U. S. 25, 78 L. Ed. 1099, 54 S. C. 608, supports jurisdiction.

Statement of Case.

A statement of the case is contained under the heading "Statement of Matter Involved" in the foregoing petition, Pages 2 to 3, and same will not be repeated here. We

emphasize: that the verified account originally sued upon by petitioners (R. 1 to 60) was not denied under oath by respondents in their original answer (R. 64 to 68), and that the correctness of the plaintiff's account sued upon was thereby admitted under Article 3736, Revised Civil Statutes of Texas, as Amended 1931 (Note 1, Appendix); that the cross-action filed by respondents against petitioner (R. 67-68) was found by the trial court in its opinion (R. 108 to 117) and the Circuit Court of Appeals in its opinion (R. 127 at 127, 128 and 129) to be a counterclaim for damages in excess of $3,000.00 for breach of contracts unrelated to the indebtedness sued upon originally by the petitioner, a citizen of Delaware. It is true that the respondents in their answer allege defensively that the products admittedly furnished by petitioner to respondents were furnished under an agreement violating the Texas Anti-Trust Statutes, and by such answer respondents sought to defeat all liability upon plaintiff's account (R. 64 to 67), but the cross-action prayed for $7,200.00 damages (R. 67-68) for breach of separate contracts. In the motion to remand filed by respondents in the Trial Court, respondents admitted (R. 79) that the petition for removal was filed in time required by law, that is, before the time petitioner was required to answer the cross-action.

Specifications of Error.

I.

The Honorable Circuit Court of Appeals for the Fifth Circuit erred in remanding this case and in holding that the cross-action filed by the respondents in the District Court of Parmer County, Texas, in which respondents, citizens of Texas, sought damages totalling $7,200.00 against petitioner, a citizen of Delaware, for the alleged breach of contracts separate and distinct from the indebtedness originally

sued upon, was not a suit removable by the petitioner as a defendant, for the reason that such decision and holding incorrectly interprets Section 28 of the Judicial Code as Amended (28 U. S. C. A. Section 71) and is contrary to the weight of authority.

II.

The Honorable Circuit Court of Appeals erred in remanding this case and in holding that petitioner, a citizen of Delaware, was not entitled under the provisions of Section 28 of the Judicial Code as Amended, as defendant in the cross-action, to remove the cross-action or counterclaim filed by respondents, citizens of Texas, in the District Court of Parmer County, Texas, from such State Court to the Federal Court, for the reason that such holding and decision improperly interprets such statute and is contrary to the weight of authority.

III.

The Honorable Circuit Court of Appeals erred in entertaining the respondents' appeal to such court from the order of the Trial Court overruling respondents' motion to reconsider their motion to remand, filed after judgment on the merits, for the reason that such order or decree was not a final judgment from which an appeal lies.

ARGUMENT.

Point I.

Summary:

The Circuit Court of Appeals erred in holding that the cross-action of respondents was not a suit that could be removed by petitioner as a defendant under the Removal Act.

Referable to Question I and Reasons I, II, and III in Petition, and Specifications of Error I and II in Brief:

For brevity and to avoid being repetitious, the Argument under Specifications I and II will be combined under this point.

Argument and Authorities under Point I:

The relevant portion of the statute involved herein, being a part of Section 28 of the Judicial Code as Amended (28 U. S. C. A. Section 71) is as follows:

> "Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction, in any State court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State."

The decision and holding of the Circuit Court of Appeals herein was to the effect that the counterclaim of the respondents was not a suit within such statute and the petitioner herein was not a defendant within such statute. The cross-action or counterclaim filed by the respondents sought affirmative relief for more than $3,000.00 on a matter unrelated to the verified account sued upon by petitioner. Under Texas practice such cross-action or counterclaim is a suit. The rule in Texas upon such subject is well stated in 38 *Texas Jurisprudence,* Page 292, Section 6, as follows:

> "A cross-bill or cross-action, or a plea in reconvention, or a set off or counterclaim is, or occupies the same position as, an independent suit by the defendant in the original suit against the plaintiff. As to the matter asserted in his cross-action or plea the defendant is the actor or plaintiff; and he has the rights and responsibilities of a plaintiff; while the plaintiff in the original suit is a defendant, with the privileges of a defendant. In other words, each party is plaintiff in respect to his own particular grievance and each party is defendant in respect to the grievance of the other. There are two

cases which may be tried together in the same proceeding or it has been said two actions are really combined into one."

Such text is amply supported by authorities cited in such text. The Supreme Court of the United States has recognized that the defendant in a cross-action upon the filing of a cross-action or counterclaim becomes the actor and is as to such cross-action the plaintiff or actor. *Merchants Heat and Light Company* v. *James B. Clow & Sons* (1907) 204 U. S. 286, 290; 51 L. Ed. 488, 490; 27 S. C. 285; *W. S. Kirby* v. *American Soda Fountain Company* (1904), 194 U. S. 141, 48 L. Ed. 911, 24 S. C. 619.

Since the first enactment of Section 28 of the Judicial Code in substantially its present form in 1887, and amendment in 1888 (Act of March 3, 1887, c. 337, Sec. 1, 24 Stat. 552; Act of August 13, 1888, c. 866, Sec. 1, 24 Stat. 433) more than twenty-five reported cases in the District Courts or Circuit Courts of Appeals have passed upon the right of a defendant in a cross-action seeking affirmative relief to remove such cross-action or counterclaim to the Federal Court. The decisions upon such question are in hopeless conflict. By far the greater number of cases and petitioner submits the better reasoned cases, uphold the right of an original plaintiff to remove to the Federal Court such cross-action or counterclaim seeking affirmative relief under the statute above quoted. There are a few cases which deny the right to so remove. These cases are in the minority, however, and were decided in many instances before the beginning of the present century. The Circuit Court of Appeals herein in its opinion (R. 129-130) recognized that the majority of the decisions were contrary to the decision of the Circuit Court of Appeals herein. The rule that petitioner contends governs the ultimate decision in this case is briefly stated in *Bankers Securities Corporation* v. *Insur-*

ance Equities Corporation (1936 C. C. A. Third Circuit) 85 F. (2d) 856, as follows:

> "When a counterclaim is filed, the plaintiff becomes the defendant in the cause of action set forth therein, and this extends to removal proceedings from a State court to a Federal court."

The decisions upholding the right of a plaintiff to remove a counterclaim filed against it to the Federal Court under the removal statute above quoted is recognized or upheld in the following cases:

Bankers Securities Corporation v. *Insurance Equities Corporation,* (C. C. A. Third Circuit N. J. 1936), 85 F. (2d) 856;

Chambers v. *Skelly Oil Company* (C. C. A. Tenth Circuit 1937), 87 F. (2d) 853;

Wichita Royalty Co. v. *City National Bank* (D. C. Tex.), 18 Fed. Supp. 609, Affirmed (C. C. A. Fifth Circuit 1938), 95 F. (2d) 671; Affirmed by the Supreme Court without referring to the jurisdictional question, 306 U. S. 103, 83 L. Ed. 515;

Carson and Rand Lumber Co. v. *Holtzclaw* (D. C. Mo. 1889), 39 Fed. 578;

Walcott v. *Watson* (C. C. Nev. 1891), 46 Fed. 529;

Price & Hart v. *T. J. Ellis & Co.* (C. C. Ark. 1904), 129 Fed. 482;

Hagerla v. *Mississippi River Power Co.* (C. C. Iowa 1912), 202 Fed. 771;

Hansen v. *Pacific Coast Asphalt Cement Co.* (D. C. Calif. 1917), 243 Fed. 283;

Chicago, M. & St. P. Ry. Co. v. *City of Spencer* (D. C. Iowa 1922), 283 Fed. 824;

Consolidated Textile Corporation v. *Iserson* (D. C. N. Y. 1923), 294 Fed. 289;

Pierce v. *Desmond* (D. C. Minn. 1926), 11 F. (2d) 327;

Mohawk Rubber Co. of New York v. *Terrell* (D. C. Mo. 1926), 13 F. (2d) 266;

Zumbrunn v. *Schwartz* (D. C. Ind. 1927), 17 F. (2d) 609;

San Antonio Suburban Irrigated Farms v. *Shandy* (D. C. Kan. 1928), 29 F. (2d) 579;

Evetts v. *Peoples Life Insurance Co.* (D. C. Tex. 1929), 36 F. (2d) 832;

American Fruit Growers, Inc. v. *La Roche* (D. C. S. C. 1928), 39 F. (2d) 243;

Houlton Savings Bank v. *American Laundry Machinery Company* (D. C. Me. 1934), 7 Fed. Supp. 858;

Groveville Sales Corporation v. *Stevens* (D. C. N. J. 1936), 16 Fed. Supp. 563;

O'Neill Bros., Inc. v. *Crowley* (D. C. S. C. 1938), 24 Fed. Supp. 705;

Baker v. *Keebler* (D. C. Tenn. 1939), 29 Fed. Supp. 555.

The following cases deny on one ground or another the right of removal to a defendant in a cross-action:

Waco Hardware Company v. *Michigan Stove Company* (C. C. A. Fifth Circuit 1899), 91 Fed. 289;

McKown v. *Kansas and Texas Coal Company* (C. C. Ark., 1901), 105 Fed. 657;

Indiana Mountain Jellico Coal Company v. *Asheville Ice and Coal Company* (C. C. N. C. 1905), 135 Fed. 837;

Illinois Central Ry. Co. v. *A. Waller & Co.* (C. C. Ky. 1908), 164 Fed. 358;

Glover Machine Works v. *Cooke-Jellico Coal Company* (D. C. Ky. 1915), 222 Fed. 531.

The annotator in Note 668 of 28 U. S. C. A. Section 71 says:

"The authorities are in hopeless discord upon the question whether, when a counterclaim or cross-bill is

> filed, the plaintiff or the defendant to the original suit is to be regarded as defendant for the purpose of removal."

Petitioner submits by reason of such conflict the Supreme Court should exercise its jurisdiction to grant the writ of certiorari.

It is respectfully submitted that the decision and holding of the honorable Circuit Court of Appeals in the present case that the term "defendant or defendants" as used in the portion of the removal statute above quoted does not apply to a plaintiff or cross-defendant (R. 129), likewise conflicts with decisions of the Supreme Court and other Circuit Courts of Appeals. Mr. Justice Holmes, speaking for the court in *Mason City & Fort Dodge Railway Company* v. *Boynton*, 204 U. S. 570, 579; 51 L. Ed. 629, 633; 27 S. C. 321, and referring to the statute in question, stated:

> "But this court must construe the act of Congress regarding removal. And it is obvious that the word "defendant" as there used is directed toward more important matters than the burden of proof or the right to open and close."

The Supreme Court has repeatedly held that under the Judicial Acts of 1875 and 1887 (March 3, 1875 c. 137, Sec. 2, 18 Stat. 470; March 3, 1887, c. 373, Sec. 1, 24 Stat. 552; August 3, 1888, c. 866, 25 Stat. 433) that in determining the right of removal, the parties should be realigned in accordance with the matter in dispute without regard to the position they occupy in the pleadings as plaintiff or defendant. Removal Cases (1879), 100 U. S. 457, 25 L. Ed. 593; *Brown* v. *Ironsdale* (1891), 138 U. S. 389, 11 S. C. 308, 34 L. Ed. 987; *Wilson* v. *Oswego Township* (1894), 151 U. S. 56, 63, 14 S. C. 259, 38 L. Ed. 70; *Merchants Cotton Press & Storage Co.* v. *The Insurance Company of North America* (1894), 151 U. S. 368, 385, 14 S. C. 367, 38 L. Ed. 195, 204;

Mason City & Fort Dodge R. R. Co. v. *Boynton* (1907), 204 U. S. 570, 27 S. C. 321, 51 L. Ed. 629; *Venner* v. *Great Northern Railway Company* (1908), 209 U. S. 24, 28 S. C. 328, 52 L. Ed. 666; *Niles-Bennett-Pond Co.* v. *Iron Moulders Union* (1920), 254 U. S. 77, 41 S. C. 39, 65 L. Ed. 145. The right of a third party brought in by a cross-action to remove under our present removal statute has likewise been recognized in *Habermel* v. *Mong* (1929 C. C. A. Sixth Circuit) 31 F. (2d) 822, Writ of Certiorari denied, 280 U. S. 587, 74 L. Ed. 636, 50 S. C. 37; *Houlton Savings Bank* v. *American Laundry Machinery Company* (1934 D. C. Me.), 7 Fed. Supp. 858; *Ellis* v. *Peak* (1938 D. C. Tex.) 22 Fed. Supp. 908.

The honorable Circuit Court of Appeals in the present case cites the decision of the Supreme Court in *West* v. *The City of Aurora* (1868) 73 U. S. 18, 6 Wall. 139, 18 L. Ed. 819, as being controlling in the present case. The facts very briefly are that the plaintiffs in error were plaintiffs in the State court. The nature of the suit was not clear to the Supreme Court but appeared to be for the recovery of the amount of interest coupons of certain bonds. The City filed an answer setting up defensive matter and prayed for an injunction against the plaintiffs from further proceeding in any suit on the coupons or bonds. On the filing of these additional paragraphs, plaintiffs dismissed their original suit and sought to remove the new matters to the Federal Court. The action was remanded. The Supreme Court held that such action was proper. This case was decided under the Judiciary Act of 1789 (Act of September 24, 1789, c. 20, 1 Stat. 73), the pertinent part (Section 12) of such statute being as follows:

> "That if a suit be commenced in any State court against an alien, or by a citizen of the State in which the suit is brought against a citizen of another State, and the matter in dispute exceeds the aforesaid sum or

value of $500.00, exclusive of costs, to be made to appear to the satisfaction of the court; and the defendant shall, at the time of entering his appearance in such State court, file a petition for the removal of the case for trial into the next circuit court * * *" (Historical Note, 28 U. S. C. A. Section 71).

This decision of the Supreme Court has been distinguished from the question here presented on three distinct grounds by other Circuit Courts and District Courts. The grounds of such distinction are:

(1) The Act of 1789 and the present removal statute are materially different in that the Act of 1789 limited the right of removal to a defendant "who shall at the time of entering his appearance in such State court * * *" file a petition for removal, while such requirement is not in our present Judicial Code. *Habermel* v. *Mong* (1929 C. C. A. Sixth Circuit) 31 F. (2d) 822, Writ of Certiorari denied, 280 U. S. 587, 74 L. Ed. 636, 50 S. C. 37; *O'Neill Bros.* v. *Crowley* (1938 D. C. S. C.) 24 Fed. Supp. 705; *San Antonio Suburban Irrigated Farms* v. *Shandy* (1928 D. C. Kan.) 29 F. (2d) 579; *Zumbrunn* v. *Schwartz* (1927 D. C. Ind.) 17 F. (2d) 609 *Price & Hart* v. *T. J. Ellis and Co.* (1904 C. C. Ark.), 129 Fed. 482;

(2) The so-called cross-action filed by the defendant in the *West* case presented defensive matters only and was merely supplemental proceedings ancillary to the main suit. *Ward* v. *Congress Construction Company* (1900 C. C. A. Seventh Circuit) 99 Fed. 598; *O'Neill Bros.* v. *Crowley* (1938 D. C. S. C.) 24 Fed. Supp. 705; *San Antonio Suburban Irrigated Farms* v. *Shandy* (1928 D. C. Kan.) 29 F. (2d) 579; *Pierce* v. *Desmond* (1926 D. C. Minn.) 11 F. (2d) 371; *Hagerla* v. *Mississippi River Power Company* (1912 D. C. Iowa) 202 Fed. 771; *Walcott* v. *Watson* (1891 C. C. Nev.) 46 Fed. 529;

(3) The record in the *West* case, as pointed out by the court therein, was so fragmentary as to be unintelligible. *O'Neill Bros.* v. *Crowley* (1938 D. C. S. C.) 24 Fed. Supp. 705; *San Antonio Suburban Irrigated Farms* v. *Shandy* (1928 D. C. Kan.) 29 F. (2d) 579.

Point II.

Summary:

The order of the Trial Court overruling respondents' motion for reconsideration of its order overruling motion to remand is not a final judgment from which an appeal lies to the Circuit Court of Appeals.

Referable to Question II and Reason IV in Petition and Specification of Error III in Brief:

Argument and Authorities Under Point II:

When this cause was removed to the Federal Court, respondents filed their motion to remand (R. 76 to 80) which was overruled (R. 80) before trial on the merits. After rendition of judgment on trial on the merits (R. 81), the respondents filed their motion for new trial and for reconsideration of their motion to remand (R. 85 to 93). This was overruled (R. 93-94). Respondents' notice of appeal (R. 95), the cost bond (R. 96), respondents' application for leave to appeal (R. 101), the order allowing appeal (R. 103), and assignments of error (R. 103-107) all recite in substance that the appeal is taken from the order of the Trial Court overruling the respondents' motion for reconsideration of their motion to remand. No appeal was taken from the judgment on the merits rendered on October 13, 1939 (R. 81). It is respectfully submitted that such an order or judgment of the Trial Court is not a final judgment from which an appeal may be taken and it is respectfully submitted that the action of the honorable Circuit Court of Appeals in entertaining this appeal is in

conflict with the following decisions: *Bender* v. *The Pennsylvania Company* (1893) 148 U. S. 502, 37 L. Ed. 537, 13 S. C. 640; *Arthur* v. *Edmunds* (1933 C. C. A. Fifth Circuit) 66 F. (2d) 21; *Lockhart* v. *New York Life Insurance Company* (1934 C. C. A. Fourth Circuit) 71 F. (2d) 684; *Klein* v. *Wilson & Co.* (1925 C. C. A. Third Circuit) 7 F. (2d) 777; which cases hold that an order overruling a motion to remand is not a final judgment from which an appeal lies. The petitioner recognizes that on an appeal from a final judgment in a case or on appeals from interlocutory orders which are made appealable by statute, that the appellate court has jurisdiction to review the action of the Trial Court in refusing a motion to remand. In the instant case, no appeal was attempted to be taken from the final judgment on the merits rendered on October 13, 1939, but the only judgment or order appealed from is an order rendered after final judgment on a motion to reconsider a motion to remand, which motion to reconsider was filed subsequent to the judgment on the merits. If action on a motion filed after a final judgment to reconsider a previous interlocutory order of the Trial Court is a final judgment from which an appeal may be taken, the power to evade the provisions of the statute that an appeal may be taken from a final judgment only is put in the power of either party and there could be no limitation as to the time that such motions might be filed and appeals taken.

Conclusion.

It is respectfully submitted that by reason of the importance of the question involved being a question of the proper construction of a Federal statute and involving removal jurisdiction, and because of the irreconcilable conflict between the Circuit Courts of Appeals upon the question involved that the Supreme Court of the United States should exercise its jurisdiction and grant a writ of

certiorari in this cause to the United States Circuit Court of Appeals for the Fifth Circuit to review the judgment of said court entered on the 6th day of December, 1940, and that upon such review the judgment of said court be reversed and the judgment of the United States District Court for the Northern District of Texas be affirmed.

Respectfully submitted,

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R. E. UNDERWOOD,
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W. M. SUTTON,
All of Amarillo, Texas;
Attorneys for Petitioner.

APPENDIX.

NOTE 1.—Article 3736, Revised Civil Statutes of Texas, as amended 1931:

"When any action or defense is founded upon an open account or other claim or claims for goods, wares and merchandise, including claims or suits for liquidated money demands based upon written contracts or based on business dealings between the parties, or for personal service rendered, on which a systematic record of said account has been kept, supported by the affidavit of the party, his agent or attorney, taken before some officer authorized to administer oaths, to the effect that such cause of action is, within the knowledge of affiant, just and true, that it is due, and that all just and lawful offsets, payments and credits have been allowed, the same shall be taken as prima facie evidence thereof, unless the party resisting such claim shall, before an announcement of ready for trial in said cause, file a written denial, under oath, stating that such account is not just or true, in whole or in part, and if in part only, stating the items and particulars which are unjust; provided, that when such counter-affidavit shall be filed on the day of the trial the party claiming under such verified account shall have the right to continue such cause until the next term of court; when he fails to file such affidavit, he shall not be permitted to deny the account, or any item therein as the case may be."

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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 727

THE SHAMROCK OIL AND GAS CORPORATION, PETITIONER,

VS.

G. OBIE SHEETS AND CHESTER SHEETS, DOING BUSINESS AS FRIONA INDEPENDENT OIL COMPANY, RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

BRIEF OF PETITIONER, THE SHAMROCK OIL AND GAS CORPORATION.

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CASES CITED.

STATUTES CITED.

TEXT BOOKS CITED.

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BRIEF OF PETITIONER, THE SHAMROCK OIL AND GAS CORPORATION.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Shamrock Oil and Gas Corporation, petitioner herein, respectfully submits that the judgment of the Honorable Circuit Court of Appeals for the Fifth Circuit rendered on the 6th day of December, 1940, in this cause should be reversed and the judgment and ruling of the United States District Court for the Northern District

of Texas, Amarillo Division, should be affirmed for the reasons hereinafter advanced.

Opinions of Courts Below.

The unreported oral opinion of the United States District Court for the Northern District of Texas, rendered in open court, when motion to remand was overruled, appears at page 108 of Record.

The opinion of the United States Circuit Court of Appeals, Fifth Circuit, rendered on December 6th, 1940, appears at page 127 of Record and is reported in 115 F. (2d) at page 880.

Grounds on Which Jurisdiction Is Invoked.

The nature of the case presented is set out in the Statement of Case which follows in this brief. The judgment to be reviewed was rendered on the 6th day of December, 1940 (R. 134) by the United States Circuit Court of Appeals, Fifth Circuit. Such judgment reversed the ruling and decision of the United States District Court for the Northern District of Texas (R. 93), and remanded this cause to such court with instructions to remand same to the State Court from which it was removed. A petition for rehearing was filed December 26th, 1940 (R. 136) and same was denied January 14th, 1941 (R. 145). Petition for writ of certiorari was presented herein on January 30th, 1941. Such petition was granted March 10th, 1941, but the review was limited to the first question presented in such petition. Jurisdiction is invoked under Section 240 (a) of the Judicial Code as Amended by Act of February 13th, 1925, c. 229, Section 1 (43 Stat. 938; 28 U. S. C. A. Section 347). The case of *Gay* v. *Ruff*, 292 U. S. 25, 78 L. Ed. 1099, 54 S. C. 608, supports jurisdiction.

STATEMENT OF CASE.

The first question presented in petition for writ of certiorari, and the question to which this review was limited when such petition for writ of certiorari was granted herein is as follows:

> "Whether a counter-claim or cross-action, set up by resident defendants in a State Court seeking damages against the original non-resident plaintiff in the amount of $7,200.00 for the alleged breach of a separate and distinct contract from the $5,390.42 indebtedness due on open account and originally sued upon, is a suit which is removable by the defendant in the cross-action (petitioner), who had been the original plaintiff, on the grounds of diversity of citizenship under Section 28 of the Judicial Code as Amended (28 U. S. C. A. Section 71)?"

The petitioner, a Delaware Corporation, sued the respondents in the District Court of Potter County, Texas, on an open account in the amount of $5,390.42 for petroleum products sold and delivered respondents (R. 1-60). On the filing of a plea of privilege by respondents (R. 61) the venue of such suit was transferred to Parmer County, Texas (R. 62-63). The respondents filed their original answer in the District Court of Parmer County, Texas (R. 64). In such answer respondents did not question the correctness of the account, nor did respondents deny same under oath as required under Article 3736, Revised Civil Statutes of Texas as Amended 1931 (Note 1 Appendix) so as to entitle such respondents to question the correctness of such account. In such answer respondents alleged as a defense to such debt that the

products furnished to respondents were delivered under an agreement violating certain Texas statutes generally referred to as Anti-Trust Statutes (R. 65-67).

In the same pleadings originally filed in the District Court of Parmer County, Texas, the respondents filed their cross-action or counter-claim (R. 67-68) wherein such respondents, citizens of Texas, sought to recover damages against petitioner, a citizen of Delaware, in the amount of $7,200.00 for the alleged breach of contracts of a different date relative to the leasing of an automobile truck. The damages so sought to be recovered in the cross-action arose out of the alleged breach of contracts found by the trial court (R. 108) and the Circuit Court of Appeals (R. 127 at 128) to be separate and distinct from the indebtedness due petitioner and originally sued upon. Petitioner, as defendant in the cross-action, filed its petition for removal and removed the cause to the United States District Court for the Northern District of Texas, Amarillo Division, (R. 69-76) on the grounds (R. 69-70) that the cross-action presented a separate and distinct suit by respondents, citizens of Texas, against petitioner, a citizen of Delaware, for $7,200.00 damages. Respondents filed a motion to remand (R. 76) in which respondents admitted (R. 79) that the petition for removal was filed in the time required by law. The motion to remand was denied (R. 80) and an unreported opinion was rendered by the trial judge in open court (R. 108). Thereafter this cause proceeded to trial and after a trial on the merits a judgment was rendered for petitioner upon the suit presented by the original petition and the suit presented by the cross-action (R. 81). Respondents filed a motion for reconsideration of their motion to remand (R. 85-93). Such motion was overruled (R. 93). Respondents appealed to the United States Circuit Court

of Appeals for the Fifth Circuit from the order overruling their motion to remand and from the judgment of the Court overruling respondents' motion for a reconsideration of the Court's order overruling motion to remand (R. 103-107).

The United States Circuit Court of Appeals, Fifth Circuit, entered its judgment on the 6th day of December, 1940, reversing the judgment appealed from and remanded this cause to the trial court with instructions to remand same to the State Court from which it was removed (R. 134). An opinion was filed by such Circuit Court of Appeals on the 6th day of December, 1940, (R. 127), 115 F. (2d) 880. It was held by such Court that the petitioner, non-resident defendant in the cross-action filed in the State Court involving matters unrelated and wholly distinct from the indebtedness originally sued upon, was not a defendant within the meaning of Section 28 of the Judicial Code as Amended (28 U. S. C. A. Section 71) and was NOT entitled to remove this cause to the Federal Court and that such statute did not authorize the removal of a cross-action or counter-claim for damages in excess of $3,000.00 involving the alleged breach of contracts distinct from the indebtedness originally sued upon. The petitioner filed its petition for rehearing on December 26th, 1940 (R. 136). Same was denied on January 14th, 1941 (R. 145). Petition for writ of certiorari was filed herein January 30th, 1941, and granted March 10th, 1941, but limited to the first question presented and above quoted.

SPECIFICATION OF ERRORS.

I.

The Honorable Circuit Court of Appeals for the Fifth Circuit erred in remanding this case and in holding that the cross-action filed by the respondents in the District Court of Parmer County, Texas, in which respondents, citizens of Texas, sought damages totalling $7,200.00 against petitioner, a citizen of Delaware, for the alleged breach of contracts separate and distinct from the indebtedness originally sued upon, was not a suit removable by the petitioner as a defendant, for the reason that such decision and holding incorrectly interprets Section 28 of the Judicial Code as Amended (28 U. S. C. A. Section 71) and is contrary to the weight of authority.

II.

The Honorable Circuit Court of Appeals erred in remanding this case and in holding that petitioner, a citizen of Delaware, was not entitled under the provisions of Section 28 of the Judicial Code as Amended, as defendant in the cross-action, to remove the cross-action or counter-claim filed by respondents, citizens of Texas, in the District Court of Parmer County, Texas, from such State Court to the Federal Court, for the reason that such holding and decision improperly interprets such statute and is contrary to the weight of authority.

ARGUMENT.

Point I.

Summary:

The Honorable Circuit Court of Appeals erred in holding that petitioner as the defendant in cross-action involving matters unrelated to the plaintiff's original suit was not entitled under the removal act as a defendant to remove the suit presented by the cross-action or counter-claim to the Federal Court.

Referable to Question I in Petition for Writ of Certiorari and quoted above under Statement of Case and Specification of Errors I and II, *supra.*

For brevity the argument under Specifications of Errors I and II will be combined under this point.

Argument and Authorities Under Point I.

The relevant portions of the statute involved herein, being a part of Section 28 of the Judicial Code as Amended (28 U. S. C. A. Section 71), is as follows:

> "Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction, in any State Court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such contro-

versy may remove said suit into the district court of the United States for the proper district."

The decision and holding of the Circuit Court of Appeals herein was to the effect that the counter-claim of the respondents was not a suit within such statute and the petitioner herein was not a defendant within such statute. The cross-action or counter-claim filed by the respondents sought affirmative relief for more than $3,000.00 on a matter unrelated to the verified account sued upon by petitioner.

Under Texas practice it is well established that a cross-action or counter-claim of the nature here involved is a suit, and that the one who denies or defends such cross-action or counter-claim is a defendant. The Texas rule upon such matters is clearly and correctly stated in 38 Texas Jurisprudence page 292, Section 6, as follows:

> "A cross-bill or cross-action, or a plea in reconvention, or a set off or counter-claim is, or occupies the same position as, an independent suit by the defendant in the original suit against the plaintiff. As to the matter asserted in his cross-action or plea the defendant is the actor or plaintiff; and he has the rights and responsibilities of a plaintiff; while the plaintiff in the original suit is a defendant, with the privileges of a defendant. In other words, each party is plaintiff in respect to his own particular grievance and each party is defendant in respect to the grievance of the other. There are two cases which may be tried together in the same proceeding or it has been said two actions are really combined into one."

Such text is amply supported by the authorities as illustrated in the following decisions:

> *Gimmel & Son* v. *Gomprecht & Co.*, (Tex. Sup. Ct. 1896) 89 Tex. 497, 35 S. W. 470.

Harris v. *Schlinke,* (Tex. Sup. Ct. 1901) 95 Tex. 88, 65 S. W. 172.

Peck v. *McKellar,* (Tex. Sup. Ct. 1870) 33 Tex. 234.

Ware v. *Jones,* (Com. of App. Sec. A Judgment Adopted by Tex. Sup. Ct. 1922) 242 S. W. 1022.

The same rule has been recognized and applied by this Honorable Court. In *Mason City & Fort Dodge Railroad Co.* v. *Boynton,* (1907) 204 U. S. 570, 51 L. Ed. 629, 27 S. C. 321, Justice Holmes said:

> "But this court must construe the act of Congress regarding removal. And it is obvious that the word 'defendant' as there used is directed toward more important matters than the burden of proof or the right to open and close."

In *Merchants Heat & Light Co.* v. *James B. Clow & Sons,* (1907) 204 U. S. 286, 51 L. Ed. 488, 489, 27 S. C. 285, it was said:

> "But by setting up its counter-claim, the defendant became the plaintiff in its turn, invoked the jurisdiction of the court in the same action, and, by invoking, submitted to it. It is true that the counter-claim seems to have arisen wholly out of the same transaction that the plaintiff sued upon, and so to have been in recoupment rather than in set off proper. But, even at common law since the doctrine has been developed, a demand in recoupment is recognized as a cross demand, as distinguished from a defense."

W. S. Kirby v. *American Soda Fountain Co.,* (1904) 194 U. S. 141, 48 L. Ed. 911, 24 S. C. 619.

The cross-action or counter-claim of respondents (R. 67) presented a claim whereby they sought damages

totalling $7,200.00 against the petitioner for the alleged breach of a contract relating to the leasing of an automobile truck. Such contract was allegedly made on a different date (R. 67) from that upon which the indebtedness to the petitioner was incurred (R. 42-59) and was an entirely separate and unrelated transaction, and the controversy thus presented was wholly unrelated to the indebtedness sued upon by petitioner, the correctness of which was not denied or questioned and which was thereby admitted under Article 3736 of the Revised Civil Statutes of Texas as Amended in 1931 (Note 1 Appendix). To prevail on the cause of action asserted by the cross-action or counter-claim the respondents would have to establish:

(1) The execution of the contract alleged;

(2) Breach of such contract by petitioner; and

(3) Amount of damages sustained by respondents as the result of such breach.

To entitle respondents to recover, these elements would have to be established without regard to whether the petitioner recovered, or failed to recover, a judgment against respondents on its cause of action for its indebtedness, or even if petitioner dismissed its cause of action against respondents. Petitioner respectfully submits that as related to such cross-action that it not only occupied the position of a defendant but was an actual defendant within not only the meaning and intent of the removal statute but also within the strict language of same. and was therefore entitled to remove the suit in controversy so presented to the Federal Court under the above quoted portion of the removal statute on the basis that such counter-claim presented a removable suit, or in any event a separable controversy.

Since the first enactment of Section 28 of the Judicial Code in substantially its present form in 1887, and amendment in 1888 (Act of March 3, 1887, c. 373, Sec. 1, 24 Stat. 552; Act of August 13, 1888, c. 866, Sec. 1, 25 Stat. 433) more than twenty-five reported cases in the District Courts or Circuit Courts of Appeals have passed upon the right of a defendant to a cross-action seeking affirmative relief to remove such cross-action or counter-claim to the Federal Court. Twenty-one of these cases uphold or recognize the right of removal; five deny such right. The petitioner respectfully submits that the cases upholding the right of removal are the better reasoned cases. The Honorable Circuit Court of Appeals in its opinion herein (R. 129-130) recognizes that the majority of the decisions upon the question presented are contrary to its decision in the instant case. The decisions since 1915 upon the question presented have been uniform in upholding the right of removal. While these decisions are not binding, it is respectfully submitted that consideration should be given to the fact that so many able jurists of the inferior courts have, after fully considering the matter, concurred in their conclusions. The basis of such decisions can be illustrated by the following three quotations:

Bankers Securities Corporation v. *Insurance Equities Corporation,* (1936 C. C. A. Third Circuit) 85 Fed. (2d) 856 at 857:

> "When a counter-claim is filed, plaintiff becomes the defendant in the cause of action set forth therein, and this extends to removal proceedings from a State Court to a Federal Court."

American Fruit Growers v. *LaRoche,* (1928 D. C. S. C.) 39 Fed. (2d) 243 at 244:

> "If the defendant had brought his case against the plaintiff in the state court, there could be no

doubt about the right to a removal. When he filed his counter-claim in the case brought by the plaintiff, then, so far as the counter-claim is concerned, he became the actor and therefore the plaintiff; and the American Fruit Growers, Inc., became, as to the counter-claim, the defendant. In that aspect, the case is literally within the terms of the Removal Act (28 U. S. C. A. Section 71). In any aspect of the case, there can be no doubt but that the case is within the spirit of that act. It is only by the most technical reasoning, and by laying aside the actualities of the case and the real position of the parties, that the right to remove can be denied."

San Antonio Suburban Irrigated Farms v. *Shandy,* (1928 D. C. Kan.) 29 Fed. (2d) 579 at 581:

"The entire scheme of the Judiciary Act is to give a non-resident, who either sues or is sued for more than $3,000, the right to have his controversy determined in a national court. The right arose because of a then existing jealousy among the colonies, which has largely disappeared; the right is still of great value, because of the opportunity it affords non-residents to have their matters submitted to a jury not affected by local prejudices and favoritisms, a consideration which may unconsciously affect courts as well. It is not to be supposed that Congress intended that such right can be taken away by artifice or device; the law is uniform that parties will be realigned to get at the truth, and removal is granted or denied according to that realignment; that is, according to the real, and not the nominal, position of the parties. * * *.

"I do not believe that Congress intended that a valuable right should be denied because of the circumstance that the Kansas procedure permits a plaintiff as to one matter to become a defendant as to another, in the same case. Such denial would make the right given by Congress turn on form rather than

on substance; it would let the nominal prevail over the actual—would follow the letter rather than the spirit. Such construction seems to me to be opposed to the doctrine of realignment, of fraudulent joinder, and other accepted doctrines which cut through the bark to get at the tree."

The following decisions recognize or uphold the right of a defendant in a cross-action to remove such suit to the Federal Court where other jurisdictional requisities are present:

Bankers Securities Corporation v. *Insurance Equities Corporation,* (C. C. A. Third Circuit N. J. 1936), 85 Fed. (2d) 856.

Chambers v. *Skelly Oil Company,* (C. C. A. Tenth Circuit 1937), 87 Fed. (2d) 853.

Wichita Royalty Co. v. *City National Bank,* (D. C. Tex.) 18 Fed. Supp. 609, Affirmed (C. C. A. Fifth Circuit 1938) 95 Fed. (2d) 671; Affirmed by the Supreme Court without referring to the jurisdictional question, 306 U. S. 103, 83 L. Ed. 515.

Carson and Rand Lumber Co. v. *Holtzclaw,* (D. C. Mo. 1889) 39 Fed. 578.

Walcott v. *Watson,* (C. C. Nev. 1891) 46 Fed. 529.

Price & Hart v. *T. J. Ellis & Co.,* (C. C. Ark. 1904) 129 Fed. 482.

Hagerla v. *Mississippi River Power Co.,* (C. C. Iowa 1912) 202 Fed. 771.

Hansen v. *Pacific Coast Asphalt Cement Co.,* (D. C. Calif. 1917) 243 Fed. 283.

Chicago, M. & St. P. Ry. Co. v. *City of Spencer,* (D. C. Iowa 1922) 283 Fed. 824.

Consolidated Textile Corporation v. *Iserson,* (D. C. N. Y. 1923) 294 Fed. 289.

Pierce v. *Desmond,* (D. C. Minn. 1926) 11 Fed. (2d) 327.

Mohawk Rubber Co. of New York v. *Terrell,* (D. C. Mo. 1926) 13 Fed. (2d) 266.

Zumbrunn v. *Schwartz,* (D. C. Ind. 1927) 17 Fed. (2d) 609.

San Antonio Suburban Irrigated Farms v. *Shandy,* (D. C. Kan. 1928) 29 Fed. (2d) 579.

Evetts v. *Peoples Life Insurance Co.,* (D. C. Tex. 1929) 36 Fed. (2d) 832.

American Fruit Growers, Inc. v. *La Roche,* (D. C. S. C. 1928) 39 Fed. (2d) 243.

Houlton Savings Bank v. *American Laundry Machinery Co.,* (D. C. Me. 1934) 7 Fed. Supp. 858.

Groveville Sales Corporation v. *Stevens,* (D. C. N. J. 1936) 16 Fed. Supp. 563.

O'Neill Bros., Inc. v. *Crowley,* (D. C. S. C. 1938) 24 Fed. Supp. 705.

Baker v. *Keebler,* (D. C. Tenn. 1939) 29 Fed. Supp. 555.

C. I. T. Corporation v. *Ambrose,* (D. C. S. C. 1940), 36 Fed. Supp. 311.

The following cases deny on one ground or another the right of removal to a defendant in a cross-action:

Waco Hardware Company v. *Michigan Stove Company,* (C. C. A. Fifth Circuit 1899) 91 Fed. 289.

McKown v. *Kansas and Texas Coal Company,* (C. C. Ark. 1901) 105 Fed. 657.

Indiana Mountain Jellico Coal Company v. *Asheville Ice and Coal Company,* (C. C. N. C. 1905) 135 Fed. 837.

Illinois Central Ry. Co. v. *V. A. Waller & Co.,* (C. C. Ky. 1908) 164 Fed. 358.

Glover Machine Works v. *Cooke-Jellico Coal Company,* (D. C. Ky. 1915) 222 Fed. 531.

Apparently the only case involving the question here presented under the Judiciary Act of 1887-8 which has reached the Supreme Court is the case of *Wichita Royalty* v. *City National Bank, supra.* In the opinion of the trial court (1937 D. C. Tex.) 18 Fed. Supp. 609 at 610, it was stated:

> "It is too late now to defend the right of a plaintiff who begins action in the state court to remove to the national court if and when national questions arise. The courts have joined in a procession of opinions supporting that right. The few cases that were to the contrary at the beginning are decidedly in the minority." Cases cited.

This case was affirmed by the Honorable Circuit Court of Appeals for the Fifth Circuit in 1938, 95 Fed. (2d) 671. The question of the trial court's refusal to remand was directly passed upon and it was held that the action of the trial court in refusing to remand was correct. The decision of the Circuit Court of Appeals was affirmed by this Honorable Court, but no reference was made to the jurisdictional question presented by the motion to remand filed in the trial court, (1939) 306 U. S. 103, 83 L. Ed. 515, 59 S. C. 420.

The Honorable Circuit Court of Appeals in its opinion in the instant case seeks to distinguish its holding herein from its holding in the Wichita Royalty case (R. 130-131) on the grounds that in the Wichita case a federal question was involved. The petitioner respectfully submits that this is a distinction without a difference for as recognized by the Honorable Circuit Court of Appeals in each instance only the defendant would be entitled to remove. In this case as in the Wichita Royalty case a cross-action or cross-bill presented new and independent matters and the defendant in the cross-bill was the one who removed.

It is respectfully urged that the opinion and holding of the Honorable Circuit Court of Appeals herein, that the term defendant or defendants in the Removal Act is used in a technical sense and refers only to the party designated as the original defendant in the action, conflicts with the decisions and rulings of this Honorable Court as well as the cases above cited directly passing upon the question involved. In *Mason City and Fort Dodge Railroad Company* v. *Boynton,* (1907) 204 U. S. 570, 579, 51 L. Ed. 629, 633, 27 S. C. 321, this Honorable Court held that the word "defendant" as used in the Act was directed to more important matters than the burden of proof or the right to open and close. This Honorable Court has repeatedly held that under the Judiciary Acts of 1875 and 1887-8 (March 3, 1875 c. 137, Sec. 2, 18 Stat. 470; March 3, 1887, c. 373, Sec. 1, 24 Stat. 552; August 13, 1888, c. 866, 25 Stat. 433) that in determining the right of removal, the parties should be realigned in accordance with the matter in dispute without regard to the position they occupy in the pleadings as plaintiff or defendant. *Removal Cases* (1879), 100 U. S. 457, 25 L. Ed. 593; *Brown* v. *Ironsdale,* (1891), 138 U. S. 389, 11 S. C. 308, 34 L. Ed. 987; *Wilson* v. *Oswego Township,* (1894), 151 U. S. 56, 63, 14 S. C. 259, 38 L. Ed. 70; *Merchants Cotton Press & Storage Co.* v. *The Insurance Company of North America,* (1894), 151 U. S. 368, 385, 14 S. C. 367, 38 L. Ed. 195, 204; *Mason City & Fort Dodge Railroad Co.* v. *Boynton,* (1907), 204 U. S. 570, 27 S. C. 321, 51 L. Ed. 629; *Venner* v. *Great Northern Railway Company,* (1908), 209 U. S. 24, 28 S. C. 328, 52 L. Ed. 666; *Niles-Bennett-Pond Co.* v. *Iron Moulders Union* (1920), 254 U. S. 77, 41 S. C. 39, 65 L. Ed. 145.

The decision of the Honorable Circuit Court of Appeals in holding that the Removal Act gives the right of

removal to an original defendant only likewise conflicts with the following decisions recognizing the right of a third party brought in by a cross-action to remove under our present Removal Statute:

Habermel v. *Mong,* (1929 C. C. A. Sixth Circuit) 31 Fed. (2d) 822, Writ of Certiorari denied, 280 U. S. 587, 74 L. Ed. 636, 50 S. C. 37.

Houlton Savings Bank v. *American Laundry Machinery Co.,* (1934 D. C. Me.) 7 Fed. Supp. 858.

Ellis v. *Peak,* (1938 D. C. Tex.) 22 Fed. Supp. 908.

The honorable Circuit Court of Appeals in its opinion cites the decision of the Supreme Court in *West* v. *City of Aurora,* (1868) 73 U. S. 18, 6 Wall 139, 18 L. Ed. 819, as being controlling in the instant case. The nature of the original action therein was not entirely clear but same appeared to be a suit for the recovery of the amount of interest coupons of certain bonds. The city (original defendant) filed an answer setting up defensive matters and subsequently filed additional paragraphs setting up new defensive matters and in each of such paragraphs prayed an injunction from further proceeding in any suit on the coupons or bonds. On the filing of these additional paragraphs plaintiffs dismissed their original suit and sought to remove the new matters to the Federal Court. The action was remanded. The Supreme Court held such action was proper. This case was decided under the Judiciary Act of 1789 (Act of September 24, 1789, c. 20, 1 Stat. 73), the pertinent part (Section 12) of such statute being as follows:

"That if a suit be commenced in any State court against an alien, or by a citizen of the State in which the suit is brought against a citizen of another State, and the matter in dispute exceeds the afore-

said sum or value of $500.00, exclusive of costs, to be made to appear to the satisfaction of the court; and the defendant shall, at the time of entering his appearance in such State court, file a petition for the removal of the case for trial into the next circuit court * * *" (Historical Note, 28 U. S. C. A. Section 71).

This decision of the Supreme Court has been distinguished from the question here presented on three distinct grounds by various Circuit Courts and District Courts. The grounds of such distinction are:

(1) The Act of 1789 and the present removal statute are materially different in that the Act of 1789 limited the right of removal to a defendant "who shall at the time of entering his appearance in such State Court * * *" file a petition for removal, while such requirement is not in our present Judicial Code. *Habermel* v. *Mong,* (1929 C. C. A. Sixth Circuit) 31 Fed. (2d) 822, Writ of Certiorari denied. 280 U. S. 587, 74 L. Ed. 636, 50 S. C. 37; *O'Neill Bros.* v. *Crowley,* (1938 D. C. S. C.) 24 Fed. Supp. 705; *San Antonio Suburban Irrigated Farms* v. *Shandy,* (1928 D. C. Kan.) 29 Fed. (2d) 579; *Zumbrunn* v. *Schwartz,* (1927 D. C. Ind.) 17 Fed. (2d) 609; *Price & Hart* v. *T. J. Ellis & Co.,* (1904 C. C. Ark.) 129 Fed. 482.

(2) The so-called cross-action filed by the defendant in the *West* case presented defensive matters only and was merely supplemental proceedings ancillary to the main suit. *Ward* v. *Congress Construction Company,* (1900 C. C. A. Seventh Circuit) 99 Fed. 598; *O'Neill Bros.* v. *Crowley,* (1938 D. C. S. C.) 24 Fed. Supp. 705; *San Antonio Suburban Irrigated Farms* v. *Shandy,* (1928 D. C. Kan.) 29 Fed. (2d) 579; *Pierce* v. *Desmond,* (1926 D. C. Minn.) 11 Fed. (2d) 371; *Hagerla* v. *Mississippi River Power Company,* (1912 D. C. Iowa) 202 Fed. 771; *Walcott* v. *Watson,* (1891 C. C. Nev.) 46 Fed. 529.

(3) The record in the *West* case, as pointed out by the Court therein, was so fragmentary as to be unintelligible. *O'Neill Bros.* v. *Crowley,* (1938 D. C. S. C.) 24 Fed. Supp. 705; *San Antonio Suburban Irrigated Farms* v. *Shandy,* (1928 D. C. Kan.) 29 Fed. (2d) 579.

It is respectfully urged that the grounds of distinction of *West* v. *City of Aurora, supra,* are well founded and that such decision is not controlling herein, particularly because of the difference in the Judiciary Act of 1789 and that of 1887-8, the Act of 1789 limiting the right of removal to a defendant who filed his petition "at the time of entering his appearance in such State court".

It was submitted by the honorable Circuit Court of Appeals herein that in adopting the Judiciary Act of 1887-8 that Congress intended to adopt the construction of the Act of 1789 placed thereon by the Supreme Court in *West* v. *City of Aurora, supra.* Petitioner respectfully submits that such conclusion does not logically follow. It is true as pointed out by the Circuit Court of Appeals that the Supreme Court has on various occasions stated that the intent of Congress in adopting the Judiciary Act of 1887-8 was to restrict the jurisdiction of the Federal courts. This was accomplished, however, by limiting the right of removal to non-resident defendants, while under the Act of 1875 then in force either the plaintiff or the defendant could remove. While the intent of Congress to restrict the right of removal may be manifest, this will not authorize a court to ignore the plain meaning of language used in the Act. *City of New Orleans* v. *Mary Quinlan,* (1899) 173 U. S. 191, 43 L. Ed. 664, 19 S. C. 329. Where Congress, recognizing the interpretation placed upon the previous Act by the courts, changed the language in the enactment of the

Act of 1887-8, it has been stated that it can not be doubted that such change was deliberately made. *Fisk* v. *Henairie,* (1892) 142 U. S. 459, 35 L. Ed. 1080, 12 S. C. 207. Thus, it is submitted, the action of Congress in omitting from the Act of 1887-8 the provision in the Judiciary Act of 1789 that the defendant should "at the time of entering his appearance in such State court" file his petition for removal, which language was held by the Supreme Court in *West* v. *City of Aurora, supra,* to limit the right of removal to an original defendant under the Act of 1789 manifests an intent and desire on the part of Congress that the right of removal should not be limited to the original defendant.

In its opinion the honorable Circuit Court of Appeals refers to Section 29 of the Judicial Code (Section 72, Title 28 U. S. C. A.), being the procedural statute relative to removals, as prohibiting the removal of such a character of case as is herein presented. Petitioner respectfully submits that there is nothing inconsistent in such statute with the right of a defendant in a cross-action to remove. The relevant portion of such statute is as follows:

> "Whenever any party entitled to remove any suit mentioned in Section 71 of this title, except suits removable on the ground of prejudice or local influence, may desire to remove such suit from a State court to the district court of the United States, he may make and file a petition, duly verified, in such suit in such State court at the time, or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the district court to be held in the district where such suit is pending * * *."

It is submitted that where the defendant in the cross-action files his petition to remove at or before the time

required by the laws of the State or the rules of the State court to answer or plead to the declaration or complaint as presented by the cross-action or counter-claim that strict compliance with such statute has been effected. It will be observed that such statute is different from the Judiciary Act of 1789 which required the petition to be filed at the time of entering appearance.

There is no question in the present controversy but that the petitioner herein filed its bond and petition for removal before the time that it was required to answer or plead to the declaration or complaint of respondents, and that same was filed within the time required under Section 29 of the Judicial Code (Section 72, Title 28, U. S. C. A.), for respondents expressly admitted such fact in their motion to remand (R. 79). The District Court of Parmer County, Texas, convened on July 10th, 1939 (Section 69, Article 199, Revised Civil Statutes of Texas Note 2, Appendix). Petitioner as the defendant in the cross-action was not required to answer or plead to the cross-action filed by respondents on July 7th, 1939 (R. 64) before the second day of the term of the District Court of Parmer County (Article 2009, Revised Civil Statutes of Texas [Note 3, Appendix]), which would be July 11th, 1939. The petition and bond for removal was filed July 10th, 1939 (R. 71). It appears therefore that petitioner strictly complied with the statute regulating the time for filing petition and bond for removal, as is admitted by respondents.

The cases herein cited at page 14 of this brief which deny to a defendant in a cross-action the right to remove the cause to the Federal Court rely and are based upon the decision in *West* v. *City of Aurora, supra,* which decision for the reasons hereinbefore advanced is not controlling under the present removal statute in the contro-

versy here presented, and it is therefore respectfully submitted that the decisions in the cases representing the minority view should not be the rule of decision in this cause.

Conclusion.

For the reasons advanced herein it is respectfully urged that the judgment of the honorable Circuit Court of Appeals herein should be reversed and the judgment and decision of the trial court should be affirmed, for which relief the petitioner prays.

Respectfully submitted,

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R. E. UNDERWOOD,
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.....

of Counsel.

APPENDIX.

NOTE 1.—Article 3736, Revised Civil Statutes of Texas, as amended 1931:

"When any action or defense is founded upon an open account or other claim or claims for goods, wares and merchandise, including claims or suits for liquidated money demands based upon written contracts or based on business dealings between the parties, or for personal service rendered, on which a systematic record of said account has been kept, supported by the affidavit of the party, his agent or attorney, taken before some officer authorized to administer oaths, to the effect that such cause of action is, within the knowledge of affiant, just and true, that it is due, and that all just and lawful offsets, payments and credits have been allowed, the same shall be taken as prima facie evidence thereof, unless the party resisting such claim shall, before an announcement of ready for trial in said cause, file a written denial, under oath, stating that such account is not just or true, in whole or in part, and if in part only, stating the items and particulars which are unjust; provided, that when such counter-affidavit shall be filed on the day of the trial the party claiming under such verified account shall have the right to continue such cause until the next term of court; when he fails to file such affidavit, he shall not be permitted to deny the account, or any item therein as the case may be."

NOTE 2.—Section 69, Article 199, Revised Civil Statutes of Texas:

"The 69th Judicial District of the State of Texas shall be composed of the counties of Parmer,

* * *, the terms of the district courts therein shall be held as follows: In the County of Parmer on the second Monday in June and July, and may continue in session three weeks; * * *."

NOTE 3.—Article 2009, Revised Civil Statutes of Texas:

"Where citation has been personally served at least ten days before the first day of the term to which it is returnable, exclusive of the day of service and return, the answer of the defendant shall be filed on or before the second day of the return term, and before the call of the appearance docket on said second day. * * *."

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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 727

THE SHAMROCK OIL AND GAS CORPORATION, PETITIONER,

VS.

G. OBIE SHEETS AND CHESTER SHEETS, DOING BUSINESS AS FRIONA INDEPENDENT OIL COMPANY, RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

REPLY BRIEF OF PETITIONER, THE SHAMROCK OIL AND GAS CORPORATION.

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To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

The Shamrock Oil and Gas Corporation, petitioner herein, submits this brief in reply to the brief of respondents filed herein. This reply will be limited to the matters urged under Points II and III of Respondents' Brief.

POINT I.

(In Reply to Point II of Respondents' Brief.)

Summary:

Petitioner, being a non-resident defendant in a cross-action seeking affirmative relief for more than $3,000.00, is a "defendant" within the removal statute, without regard to whether the original action filed by petitioner was for more or less than the jurisdictional amount of $3,000.00.

Argument and Authorities Under Point I.

It is true that in some, but not all, of the cases cited by petitioner in support of the right of removal, and shown at pages 13 and 14 of its brief filed herein, that the original action therein was for an amount less than the requisite jurisdictional amount of the federal courts. The fact that the original plaintiffs in such suits could not have gone into the federal court in the first instance was assigned in some of the opinions as an additional reason why the removal in such cases should be permitted when the original plaintiff, in his turn, became a defendant in a cross-action seeking affirmative relief. In each instance where such matter was discussed, however, the conclusion that the case was removable was based on other and more substantial grounds, to-wit: that the original party plaintiff, insofar as the cross-action seeking affirmative relief was concerned, became a defendant and therefore entitled, within the meaning and intent of the removal statute, to remove the case presented by the cross-action to the federal court.

Petitioner respectfully submits that it should not be penalized by a denial of the right to remove the suit against it because it had instituted another suit in the state court, particularly so where the damage suit filed against it was entirely unrelated to and grew out of contracts of a different date and completely separate and distinct from the indebtedness sued upon. Since the suit filed against petitioner was entirely separate and unrelated to the petitioner's original suit, and since the petitioner could not have anticipated that a cross-action for damages for a breach of an entirely separate and distinct contract would be presented in a cross-action, and since petitioner did nothing inconsistent with its right to remove the cross-action to the federal court, it can not be logically said that petitioner in any wise waived its right to remove its cross-action or selected the state court as the forum to try the separate suit presented by the cross-action, since waiver is a question of intent which must clearly appear. *Houlton Savings Bank* v. *American Laundry Machinery Company,* (D. C. Me. 1934), 7 Fed. Sup. 858; *Stuart* v. *United Benefit Life Insurance Company,* (D. C. N. C. 1933), 2 Fed. Sup. 641; *McMillen* v. *Indemnity Insurance Company of North America,* (D. C. Mo. 1925), 8 Fed. (2d) 881; *Atlanta, K. & N. Ry. Company* v. *Southern Ry. Company,* (C. C. A. Sixth Circuit 1904), 131 Fed. 657; *Whiteley Malleable Castings Company* v. *Sterlingworth Railway Supply Company,* (D. C. Ind. 1897), 83 Fed. 853; *Payne* v. *Beaumont,* (Tex. C. C. A. 1922, Writ Refused), 245 S. W. 94.

The privilege of removal and the right to resort to the federal courts is a valuable right. Such fact has been recognized by this Honorable Court and such privilege has been protected by holdings that such right can not be defeated by the fraudulent joinder of a resident defendant: *Wilson* v. *Republic Iron and Steel Company,*

(1921), 257 U. S. 92, 66 L. Ed. 144, 42 S. C. 35; *Chesapeake and Ohio Ry. Company* v. *Cockrell,* (1914), 232 U. S. 146, 58 L. Ed. 544, 34 S. C. 278; *Pullman Company* v. *Jenkins,* (1939), 305 U. S. 534, 83 L. Ed. 334, 59 S. C. 347; and by holdings that such right or privilege of removal or the jurisdiction of the federal courts can not be abridged or impaired by state statute: *Barrow Steamship Company* v. *Kane,* (1898), 170 U. S. 100, 42 L. Ed. 964, 18 S. C. 526; *The Southern Pacific Company* v. *Denton,* (1892), 146 U. S. 202, 36 L. Ed. 942, 13 S. C. 44; *Barron* v. *Burnside,* (1887), 121 U. S. 186, 30 L. Ed. 915, 7 S. C. 931; *Home Insurance Company of New York* v. *Morse,* (1874), 87 U. S. (20 Wall.) 445, 22 L. Ed. 365. This Honorable Court has on numerous occasions, as pointed out at page 16 of petitioner's brief filed herein, held that in determining the right of removal the parties should be realigned in accordance with the matter in dispute without regard to the position they occupy in the pleadings as plaintiff or defendant.

It is respectfully urged that in line with the established precedent to protect the privilege of removal as evidenced by the above decisions that this Honorable Court should hold, in a case of the kind here presented, where the cross-action seeks affirmative relief for damages for breach of a contract of a different date and separate and distinct from the account originally sued upon, that the defendant in such cross-action is entitled to remove even though such party might likewise be the plaintiff in the original but unrelated suit.

The Court in this suit is not called upon to decide the right of removal in a cross-action that is so interrelated to the matters involved in the original action that the cross-action is merely ancillary to the main suit, as the cross-action here involved is entirely separate and

unrelated. To avoid multiplicity of actions Texas statutes permit, but do not require, a cross-action involving a wholly unrelated matter, such as is here presented, to be filed as a counter-claim. Articles 2015, 2014, Revised Civil Statutes of Texas (Notes 1 and 2 Appendix); *Thomas* v. *Hill,* (1848), 3 Tex. 270; *Barton* v. *Farmers' State Bank,* (Section A, Tex. Com. App. 1925), 276 S. W. 177 at 180-181; *Johnson* v. *Shambeck,* (Section B, Tex. Com. App. 1929), 13 S. W. (2d) 350; *Ferguson* v. *Plainview National Bank,* (Tex. C. C. A. 1931), 42 S. W. (2d) 834. When such counter-claim is filed, the plaintiff can urge such defenses to the counter-claim as an original defendant. Article 2004, Revised Civil Statutes of Texas (Note 3, Appendix). Such counter-claim remains as a suit even though the original action be dismissed. Article 2016, Revised Civil Statutes of Texas (Note 4, Appendix). The right to set off an unliquidated demand against a liquidated demand and vice versa is not authorized if the plaintiff timely objects, Article 2017, Revised Civil Statutes of Texas (Note 5, Appendix). This is not a jurisdictional statute, however, but merely grants a privilege to the plaintiff which he may waive. *Montgomery* v. *Gallas,* (Tex. C. C. A. 1924), (Writ Refused), 257 S. W. 956; *A. B. Frank Co.* v. *A. H. Motley Co.,* (Tex. C. C. A. 1896), 37 S. W. 868; *Wentworth* v. *King,* (Tex. C. C. A. 1899), (Writ of Error dismissed by Tex. Sup. Ct. for want of jurisdiction), 49 S. W. 696; *Gillett* v. *Moody,* (Tex. C. C. A. 1899), 54 S. W. 35; *Gibson* v. *Singer Sewing Machine Co.,* (Tex. C. C. A. 1912), 147 S. W. 285; *Christian-Holmes Cedar Company* v. *Dewees Cedar Company,* (Tex. C. C. A. 1920), 221 S. W. 681; *Briggs* v. *Ladd,* (Tex. C. C. A. 1933), 64 S. W. (2d) 389. As will appear from the judgment of the trial court (R. 81) and the charge of the Court to the jury (R. 77) the petitioner, defendant in cross-action, raised no objection to the right to present the cross-action herein and pro-

ceeded to trial and requested an instructed verdict upon such cross-action which was granted. The trial court therefore had jurisdiction of the cross-action here involved, and it is urged that where such a separate and distinct suit as is here involved is presented, the defendant in such suit should be permitted to remove same.

POINT II.

(In Reply to Point III of Respondents' Brief.)

Summary:

The cross-action filed by respondents in the state court sought affirmative relief in the form of damages for more than $3,000.00 and was both in effect and in fact an action that could have originally been filed and maintained in the federal court as an independent suit, and could therefore be removed from the state to the federal court by the non-resident defendant therein.

Argument and Authorities Under Point II.

It makes no difference by what name you call the cross-action filed by respondents in the state court, such cross-action has all of the attributes of a suit, and is in fact a suit. (Same (R. 67, 68) alleges a contract relative to the leasing of an automobile truck. It alleges a breach of such contract. It alleges damages sustained by the respondents as a result of the alleged breach by the petitioner. Damages for such breach are sought against the petitioner as defendant. Such allegations constitute a sufficient pleading of a cause of action for damages as a result of a breach of contract. The answer and cross-action (R. 64 and 67) reflect the plaintiffs in such cross-action to be residents of the State of Texas and the defendant in such cross-action to be a non-resident of the State of Texas. It makes no difference whether you refer to the prayer of such cross-action for assistance in de-

termining the allegations made in such cross-action or whether you look at the allegations in such cross-action unaided by the prayer for relief. Same reflects to be a claim for damages in excess of $5,000.00 for breach of a contract and as such presents a suit that could have been originally instituted and maintained in the Federal Court as an independent action.

Respondents urge various and conflicting claims as to the character of relief sought under such cross-action. Petitioner submits that the prayer for relief and the answer to the plaintiff's suit may be looked to for aid in determining the intent and effect of the pleading as a cross-action. In the answer proper (R. 64 to 67) it was claimed that the goods sold by petitioner to respondents were sold under a void contract, contrary to the Texas Anti-Trust or Anti-Monopoly Statutes. If this defense were sustained, the petitioner as the original plaintiff would not have been entitled to recover against the respondents on its account. *W. T. Raleigh Company v. Land, et al.*, (Tex. Com. App. 1926), 279 S. W. 810. If such defense had been sustained, this would have left the respondents' cross-action to be tried. This fact, and the fact that the cross-action was not in the alternative to be urged only if the defense of void contract was overruled, demonstrate that the cross-action was not merely a defensive matter ancillary to the original suit. The account and indebtedness sued upon was not denied by respondents under Article 3736, Revised Civil Statutes of Texas as amended in 1931 (Note 1, Appendix Petitioner's Brief) nor was same denied in the answer of respondents as is required under Section 11 of Article 2010, Revised Civil Statutes of Texas (Note 6, Appendix herein). This further demonstrates that offense and not defense was the object of the cross-action since the correctness or justness of the account was not defended

against. Such failure to deny under oath is a circumstance indicating that respondents did not consider their cross-action as defensive but as one seeking affirmative relief.

The running account sued upon had its inception on June 16th, 1938 (R. 4). The contract sued upon in the cross-action was entered into on or about the 1st day of February, 1939, according to respondents' allegations (R. 67). The very difference in dates demonstrates that the two are separate and unrelated. In addition to the authorities cited at pages 8 and 9 of petitioner's brief herein to the effect that the character of cross-action presented here is an independent suit, petitioner cites the following cases as supporting such proposition: *Bates* v. *Republic of Texas,* (Tex. Sup. Ct. 1847), 2 Tex. 616; *Branscun* v. *Reese,* (Tex. C. C. A. 1919), 219 S. W. 871; *Dickson* v. *Watson,* (Tex. C. C. A. 1909, Writ Dismissed), 115 S. W. 100; *Bishop* v. *Mount,* (Tex. C. C. A. 1913), 152 S. W. 442; *Cameron* v. *Williams,* (Tex. C. C. A. 1918, Writ Refused), 203 S. W. 928; *Commercial Investment Trust, Inc.* v. *Smart,* (Tex. Com. App. 1934), 67 S. W. (2d) 858.

Petitioner respectfully submits that it is really of no importance whether the matters urged in the cross-action are related to the matters involved in the original suit or are independent thereof since the cross-action is one seeking affirmative relief and is a suit under the decisions last referred to. In this case, however, since the cross-action so clearly reflects that it involves a matter wholly unrelated to the account originally sued upon, additional reasons and equities for permitting the defendant in such suit to remove are presented.

Turning to the question of the amount sought in the cross-action, petitioner respectfully submits that the au-

thorities are contrary to the respondents' contention that only $2,200.00 is involved in the cross-action. It has been the consistent holdings of Texas courts, where a cross-action seeking affirmative relief is filed, that the amount involved in the cross-action is the amount sought therein and not the balance due after the claim of the defendant in the cross-action is deducted from the claim of the plaintiff in the cross-action. The question has been considered in Texas most frequently in connection with the jurisdiction of the county or justice courts, their jurisdiction in civil cases being limited to maximum amounts of $1,000.00 and $200.00 respectively. *Gimbel & Son* v. *Gomprecht & Co.,* (Tex. Sup. Ct. 1896), 89 Tex. 497, 35 S. W. 470; *Pennant Oil and Gas Company* v. *Lightfoot,* (Tex. Com. App. 1927), 292 S. W. 517; *Hardeman* v. *Morgan,* (Tex. Sup. Ct. 1877), 48 Tex. 103; *Smith* v. *Dye,* (Tex. C. C. A. 1899), 52 S. W. 981; *Clark* v. *Smith,* (Tex. C. C. A. 1902), 68 S. W. 532; *Pennybacker* v. *Hazlewood,* (Tex. C. C. A. 1901), 61 S. W. 153; *Russell* v. *Safford,* (Tex. C. C. A. 1920), 225 S. W. 281. This same principle is applied and enforced in the federal courts: *Turner* v. *Southern Home Building and Loan Association,* (C. C. A. Fifth Circuit—appealed from Northern Dist. of Texas, 1900), 101 Fed. 308; *Pickham* v. *Wheeler-Bliss Manufacturing Company,* (C. C. A. Seventh Circuit, 1897), 77 Fed. 663, Certiorari denied 168 U. S. 708, 42 L. Ed. 1211, 18 S. C. 945; *Morrow* v. *Mutual Casualty Company of Chicago,* (D. C. Ky. 1937), 20 Fed. Sup. 193.

The prayer to the answer and cross-action of respondents makes it manifest that the respondents deemed and treated their cross-action as a suit for affirmative relief for the amount of $7,200.00, but even if the body of the allegations in the cross-action is looked to in determining the amount claimed under such cross-action as is contended by respondents, such allegations reflect that

such claim is for an unnamed amount in excess of $5,000.00. In either instance a suit above the jurisdictional amount of the federal court is presented.

No attempt has been made to answer all of the conflicting contentions of respondents relative to the cross-action being defensive, but it is respectfully submitted that the cross-action speaks for itself and reflects to be one seeking affirmative relief for more than $5,000.00 against a non-resident defendant upon a matter unrelated to the account sued upon, and that same presents a suit that was properly removed in due time.

Conclusion.

Petitioner prays that, for the reasons and authorities herein assigned and urged and assigned and urged in the brief of petitioner heretofore filed herein, the judgment of the Honorable Circuit Court of Appeals in this case should be reversed and the judgment and ruling of the trial court should be affirmed.

Respectfully submitted,

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All of Amarillo, Texas,
Counsel for Petitioner.

R C Johnson

Of Counsel.

APPENDIX.

NOTE 1.—Article 2015, Revised Civil Statutes of Texas:

> "Whenever any suit is brought for the recovery of any debt due by judgment, bond, bill or otherwise, the defendant shall be permitted to plead therein any counter claim he may have against the plaintiff, subject to such limitations as may be prescribed by law. The plea setting up such counter claim shall state distinctly the nature and the several items thereof, and shall conform to the ordinary rules of pleading."

NOTE 2.—Article 2014, Revised Civil Statutes of Texas:

> "When a defendant shall desire to prove payment, counter claim or set-off, he shall file with his plea an account stating distinctly the nature of such payment, counter claim or set-off, and the several items thereof; failing to do so, he shall not be allowed to prove the same, unless it be so plainly and particularly described in the plea as to give the plaintiff full notice of the character thereof."

NOTE 3.—Article 2004, Revised Civil Statutes of Texas:

> "When the defendant sets up a counter claim, the plaintiff may plead thereto under rules prescribed for pleadings of defensive matter by the defendant, so far as applicable. Whenever the defendant is required to plead any matter of defense under oath, the plaintiff shall be required to plead such matters under oath when relied on by him."

NOTE 4.—Article 2016, Revised Civil Statutes of Texas:

"Where the defendant has filed a counter claim seeking affirmative relief, the plaintiff shall not be permitted, by a discontinuance of his suit, to prejudice the right of the defendant to be heard on such counter claim."

NOTE 5.—Article 2017, Revised Civil Statutes of Texas:

"If the plaintiff's cause of action be a claim for unliquidated or uncertain damages, founded on a tort or breach of covenant, the defendant shall not be permitted to set off any debt due him by the plaintiff. If the suit be founded on a certain demand, the defendant shall not be permitted to set off unliquidated or uncertain damages founded on a tort or breach of covenant on the part of the plaintiff. However, the defendant may plead in set off any counter claim founded on a cause of action arising out of or incident to, or connected with, the plaintiff's cause of action."

NOTE 6.—Article 2010, Revised Civil Statutes of Texas:

"An answer setting up any of the following matters, unless the truth of the pleadings appear of record, shall be verified by affidavit:

* * * * *

"11. That an account which is the foundation of the plaintiff's action, and supported by an affidavit, is not just; and, in such case, the answer shall set forth the items and particulars which are unjust. * * * * *."

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FILE COPY

Supreme Court of The United States

OCTOBER TERM, 1940

No. 727

THE SHAMROCK OIL AND GAS CORPORATION
Petitioner

VS

G. OBIE SHEETS AND CHESTER SHEETS, doing business as FRIONA INDEPENDENT OIL COMPANY, Respondents

On Writ of Certiorari To The United States Circuit Court of Appeals, Fifth Circuit

BRIEF OF RESPONDENTS

G. Obie Sheets and Chester Sheets, Doing Business as Friona Independent Oil Company

BEN P. MONNING
and
E. BYRON SINGLETON
Amarillo, Texas
Counsel for Respondents.

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BRIEF OF RESPONDENTS

G. Obie Sheets and Chester Sheets, Doing Business as Friona Independent Oil Company

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To The Honorable The Chief Justice and Associate Justices of The Supreme Court of The United States:

G. Obie Sheets and Chester Sheets, doing business as Friona Independent Oil Company, Respondents herein, respectfully submit that the judgment of the Honorable Circuit Court of Appeals for the Fifth Circuit, rendered on the 6th day of December, 1940, in this cause should be affirmed. The judgment of the Circuit Court reversing the judgment and ruling of the United States District Court for the Northern District of Texas, Amarillo Division, and directing

that this cause be remanded to the State Court should be affirmed for the reasons hereinafter advanced.

OPINIONS OF COURTS BELOW

The unreported oral opinion of the United States District Court for the Northern District of Texas, rendered in open court appears on page 108 of Record.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit, rendered on December 6th., 1940, appears on page 127 of Record, and is reported in 115 Federal (2d) at page 880.

OBJECTIONS TO GROUNDS OF JURISDICTION

The statement of Petitioner under its grounds upon which jurisdiction was invoked is substantially correct. Upon the grounds stated and upon the authorities urged jurisdiction is not properly invoked in this cause. Petitioner urges for consideration the case of GAY V RUFF, 299 U. S. 25, 78 Law Ed. 1099, 54 Sup. Ct. 608, 92 A.L.R. 970, which requires the amount in controversy to exceed $3,000.00 except in those cases where jurisdiction is conferred regardless of amount, and likewise requires the petition for removal to be filed in the State Court before the time fixed for answer there. Aside from the question presented in petition for writ of certiorari jurisdiction is lacking as reflected from the record in this case as evidenced in the cross-action and off-set urged by the defendants, respondents herein, wherein the damage clause therein reads "Wherefore defendants and each of them have been damaged in the sum of $5,000.00, which should be allowed as an off-set to any claim which plaintiff may have herein, and in the further sum of $2,200.00, for which defendants pray by way

of cross-action against the plaintiff herein" (Record 68) The petition for removal was not filed in the State Court before the time fixed for answer there, in that the petitioner sued the respondents in the District Court of Potter County, Texas, for the sum of $5,390-42 (Record 1-60); respondents filed their plea of privilege (Record 61); and the venue of the suit was transferred to Parmer County, Texas (Record 62-63); the off-set and counterclaim filed appears in paragraph VI of defendants' answer (Record 67-68); the Circuit Court of Appeals, in its opinion, set forth that the question involved was "it is whether or not a counter-claim set up by a defendant in a State Court, filed by way of defense and for affirmative relief, is a suit which is removable by the plaintiff and cross-defendant under Section 28 of the Judicial Code" (Record 127-128); the pleadings cited reflect an off-set for $5,000.00 by way of a defense and pray for affirmative relief in the amount of only $2,200.00 and being less than $3,000.00, although the prayer (Record 68) asks judgment for $7,200.00 it does not alter the defensive off-set of $5,000.00 and the affirmative cross-action for only $2,200.00, because the question of removability is determined alone by plaintiff's bona fide allegations and the prayer is not a part thereof. HAENNI VS. CRAVEN, 56 Federal (2d) 261; JENNINGS VS. RAY, 7 Fed. Sup. 417; HART VS. MARTIN, 299 S. W. 520; COLLINS VS. MARTIN, 6 S. W. (2d) 126; MORRISSEY VS. JONES, 24 S. W. (2d) 1101; CRETIEN VS. KINCAID 84 S. W. (2d) 1094 affirmed in KINCADE VS. CRETIEN, 111 S. W. (2d) 1098; CITY OF FLOYDADA VS. GILLIAM, 111 S. W. (2d) 761.

STATEMENT OF THE CASE

The statement of the case as submitted by petitioner is substantially correct, with the following modifications:

Petitioner stated that the Respondents did not question the correctness of the account sued upon, nor deny same under oath as required by Article 3736 of the Revised Civil Statutes of Texas, such as to authorize Respondents to question correctness of the account; that statement is erroneous in that petitioner filed its suit upon a running account, which items totaled $26,066.66, and further setting up the off-sets to the account aggregating $20,676.24, and urging their cause of action for the remainder or difference between the account urged and the off-sets admitted, and being a suit for $5,390.42 (Record 1-60); petitioner's original pleadings take into consideration as one of the lawful off-sets an item known as earnings on a truck (Record 59) and proper credit was given to your Respondents therefor on April 13, 1939 (Record 59) and, likewise, one of the charges upon which it sues relates to the operation of a truck and being a charge item on December 13, 1938, (Record 56) the petitioner's original petition recognized that whatever credits and off-sets existed by virtue of the operation of the truck were called to the attention of the Court in Potter County, Texas, and thereafter to the District Court of Parmer County, Texas, for determination; the opinion of the Circuit Court of Appeals recognized that the $5,000.00 item and the $2,200.00 item were urged by way of defense and for affirmative relief (Record 127-128); the Texas Statute Article 3736, appearing in the appendix, reflects that the

time when a party is required to answer under oath, by written denial, to a proceedings for an itemized verified account is before an announcement of ready for trial in said cause, that point was never reached in the State Court, there was no occasion for that point to have been reached since the petition for removal was urged on appearance day and being the day when the case otherwise would have been set down for a definite day, for trial.

Likewise, what is stated by Petitioner with reference to a claim for $7,200.00 is nothing more or less than Paragraph VI (Record 67-68), which reads as follows:

"And, by way of cross-action and as an off-set defendants and cross plaintiff further say:

On or about the 1st day of February, 1939, plaintiff entered into an agreement with the defendants, and each of them, whereby the defendants were to purchase newer and improved equipment for the transportation of gasoline, and were, in turn, to lease said truck by hauling Shamrock gasoline from Shamrock plants to the various retail establishments created by the plaintiff herein, and were to use said truck and to have the depreciation, up-keep, and cost of operation of said truck paid by the plaintiff and to continue the operation of hauling for plaintiff herein until the sum of $5,000.-00 was earned by the defendants from the operation of said truck in the transportation of gasoline, to be used as an off-set of defendant's account; that immediately thereafter, to induce the defendants, and each of them to expend their funds for such

gasoline truck and transportation equipment, and to cause them to enter into such contract with plaintiff for hauling of such gasoline, plaintiff agreed to allow defendants to continue to operate at least one truck in such manner, whereby plaintiff was obligated to pay the salary of the driver, the cost of operation, depreciation, and up-keep and to yield a sum of approximately $300.00 monthly to the defendants, and that said contract should continue indefinitely, as long as defendants desired to continue making said hauls; that although defendants placed themselves in a position to make such hauls and commenced making such hauls, soon thereafter plaintiff refused to allow defendants to haul its gasoline, and soon thereafter concluded its sale of gasoline to these defendants.

Wherefore, defendants, and each of them, have been damaged in the sum of $5,000.00, which should be allowed as an off-set to any claim which plaintiff may have herein, and in the further sum of $2,200.00, for which defendants pray by way of cross-action against the plaintiff herein."

A probable printing error appears on page 5 of Petitioner's Brief setting forth that the Circuit Court ruled "that the petitioner was entitled to remove this cause to the Federal Court," when we feel sure Counsel for Petitioner intended it to read "was not entitled to remove this cause to the Federal Court."

Point I

The Honorable Circuit Court of Appeals correctly ruled in its holding that petitioner, being the original plaintiff in a suit filed by it in a State Court, is not such a defendant by reason of the filing of a cross-

action in excess of the jurisdictional amount and involving matters unrelated to plaintiff's original suit as to entitle it under the removal act, as a defendant, to remove the suit presented by the cross-action or counter-claim to the Federal Court.

This point and argument is in direct answer to Petitioner's Specification of Errors I and II.

ARGUMENT AND AUTHORITIES UNDER POINT I

The opinion from the Honorable Circuit Court of Appeals in this cause properly construes the removal act and historically treats the Congressional changes in the act and we adopt the construction of the Circuit Court relative to the construction of the removal act as such appears in Record pages 129-134 as follows:

> "From 1875 to 1887, the right of removal on the ground of diversity of citizenship was given to plaintiff as well as to defendants. At all other periods since the adoption of the Judiciary Act of 1789, such right was limited to defendants, except under the act of 1867, which applied only to cases where there was the additional ground of prejudice and local influence. At the present time, only the defendant or defendants, being non-residents of the state in which the suit is brought, may remove the suit into the District Court of the United States. In no instance mentioned in said Section 28 is the right of removal expressly conferred upon a plaintiff or cross-defendant.
>
> The removing party here was the plaintiff in the action filed in the state court, and did not become entitled to remove because of set-off or counter-

claim was asserted against it by cross-action. The right to remove is given only to a defendant who has not voluntarily submitted himself to the jurisdiction of the state court, 'not to an original plaintiff in a State court who, by resorting to that jurisdiction, has become liable under the State law to a cross-action.' The decision to this effect, just cited, was under the Judiciary Act of 1789, but the applicable provision thereof was not materially different from the (fol. 131) present statute, the right of removal then and now being given only to the defendant.

In Waco Hardware Company v. Michigan Stove Co., 91 Fed. 289, wherein the plaintiff in the state court sued for less than the federal jurisdictional amount and was met with a counter-claim for a sum greater than such jurisdictional amount, this court refused to read 'between the lines of the act' and extend to the plaintiff in a state court a right, which, it said, the law clearly intended to give only to the defendant or defendants therein. There are decisions to the contrary, but both reason and the weight of authority seems to us to be against allowing the plaintiff to remove because he becomes a cross-defendant in a controversy between citizens of different states having the requisite jurisdictional amount.

The case of Wichita Royalty Company v. City National Bank is cited by appellee to sustain removal. It involved a federal question and not diversity of citizenship. The cross-bill brought in new parties, including the receiver of an insolvent national bank which had closed its doors since the

original suit was filed; it might and probably (fol. 132) should have been filed as an independent suit; it certainly should have been characterized as a supplemental cross-bill; but be that as it may, this cross-bill was construed by the district court to be 'really a bill to wind up the affairs of the bank.' The Circuit Court of Appeals concurred in this construction, and the jurisdictional point was not mentioned by the Supreme Court in its opinion.

Only defendants may remove, either on the ground of a federal question or by reason of diversity of citizenship. In cases of diversity the right is given only to non-resident defendants. In both cases all of the defendants must join in the petition to remove, except where there is a separable controversy wholly between citizens of different states. In all other respects the statutory provisions with reference to removal are substantially the same in cases involving federal questions as in those depending upon diversity of citizenship; and yet the principle which controlled the decision in West v. Aurora City was not overruled by the decision in Wichita Royalty Co. v. City National Bank, supra, because of the distinguishing facts mentiond in the preceding paragraph.

Although directly in point, it is said that West v. Aurora City is an old case which has lost its value by changes in the statute. Exactly the reverse is true; it has gained in value as an authority by the course of legislation on the subject, because the pertinent provision at this time is the same as when that decision was rendered, and the intervening changes, expanding and then contracting the right

of removal, emphasize the legislative intent to limit it to (fol. 133) the defendant in the statute in force at the present time.

We have seen that the Aurora City case was decided in 1867, when only defendants were given the right to remove. By the act of 1875, supra, the right to remove was extended to either party, and this act, which repealed the provision of the Judiciary Act of 1789 limiting the right of removal to defendants only, necessarily repealed the construction thereof which held that a plaintiff or cross-defendant was not entitled to remove under the act of 1789. The act of 1875, which permitted either the plaintiff or defendant to remove, was repealed by the act of 1887-8, which reenacted the applicable provision of the act of 1789 restricting the right of removal to the defendant or defendants. In readopting that provision, the Congress naturally readopted the construction which had been put upon it in West v. Aurora City, supra. The same provision with the same construction is now a part of Section 28 of the Judicial Code. That interpretation cannot be lightly put aside without violating well-settled rules of statutory construction.

The general purpose of the act of 1887-8, supra, was to contract federal removal jurisdiction; a special purpose was to take away from plaintiffs the right of removal which had been given to them by the act of 1875, supra. This was clearly evidenced by omitting the words 'either party' which had been used in the act of 1875, and employing the words 'defendant or defendants therein being non-residents of the state.' We have, then, this situation: In

1867 the right of removal was limited by statute to non-resident defendants, which statute was held not to include plaintiffs who were also cross-defendants; in 1875 the statute was amended so as to include 'either party,' which, of course, (fol. 134) embraced plaintiffs whether or not they were also cross-defendants; in 1887 the statute was again amended, omitting the use of the words 'either party,' and making no refernce to plaintiffs or cross-defendants, but expressly limiting the right to non-resident defendants. It would not be reasonable to conclude that Congress reenacted the pertinent provision of the law in force in 1867, and rejected the construction which had been put upon that provision by the Supreme Court at that time. If this had been the intention, it might easily have been expressed by adding the words 'cross-defendant or cross-defendants.'

The cases which refused to follow West v. Aurora City because it was under a different law do not mention the distinguishing features. If they did, it would be observed that there is no material difference on the point before us, and that whatever changes were made in 1887 were made with a view of contracting federal removal jurisdiction. In Mackay v. Unita Development Company, 229 U. S. 173, 175, the Supreme Court found 'it unnecessary to consider the status of the parties in the state court and who was technical plaintiff and who technical defendant, or whether Mackay, a non-resident defendant, sued in a state court for $1,950, could, by filing a counter-claim for $3,000, acquire the

right to remove the case to the United States Court.'

It is argued that a non-resident plaintiff, by going into a state court, does not waive his right to remove to the federal court when a counter-claim is filed against him. This is not a question of waiver but of whether or not there was a statutory grant in the first instance; and this is a question of congressional intent. The primary purpose of the act of 1887-8 to cut down jurisdiction was effected by limiting the right of removal to non-resident defendants and by (fol. 135) shortening the time allowed to file the petition to remove.

By the Judiciary Act of 1789, the petition to remove was required to be filed by the defendant at the time of entering his appearance in the state court. By the act of 1875, under which either party was entitled to remove, the filing of the petition was permitted at 'any time before the trial or final hearing.' By the act of 1887-8, which omitted plaintiffs, the petition was required to be filed by the non-resident defendant at or before time he was required to plead in the state court. These statutory alterations and refinements reveal no haphazard policy of the Congress; they disclose a definite legislative purpose, at different periods in our history, first of expanding and then of contracting federal removal jurisdiction.

Section 28 of the Judicial Code names the persons entitled to remove; section 29 provides how any person entitled to remove may exercise the right. He may file a petition in the state court at or before the time the defendant is required to plead

or answer. This provision contemplates the defendant, not the plaintiff, as the party entitled to remove. No time is fixed within which a plaintiff or cross-defendant may petition to remove. In actual practice, the time limit upon filing the petition to remove, designed only for defendants, would generally deny that right to plaintiffs who are made cross-defendants. We should not ascribe to the Congress an implied intention to (fol. 136) accord to cross-defendants a right to remove when the statute under consideration contains a procedural provision which shows that the exercise of such right by plaintiff and cross-defendants was not within the legislative contemplation at the time of enactment.

The judgment appealed from is reversed, and the cause remanded to the district court with instructions to remand the same to the state court from which it was removed."

Point II

The Honorable Circuit Court of Appeals is correct in its holding that petitioner, being a non-resident original plaintiff filing suit against a resident defendant in a state court for more than $3,000.00 cannot upon appearance of a cross-action in excess of $3,000.00 remove the original suit and the cross-action or counter-claim to the Federal Court.

This point is urged in answer to the authorities submitted by petitioner in support of its Specification of Errors I and II.

ARGUMENTS AND AUTHORITIES UNDER POINT II

Among those cases cited by Petitioner to authorize its removal we find that in the reading of such authorities the Circuit Courts and District Courts, in their opinions, definitely limt the right of removal upon urging of a cross-action to those cases wherein the original plaintiff was urging a cause of action in a state court, originally, for less than $3,000.00 and being those cases wherein the non-resident original plaintiff was never afforded a chance to have its litigation heard in the Federal Court until the presentation of a cross-action in excess of $3,000.00. Such a fact situation does not exist in the case at bar, in that Petitioner voluntarily instituted its proceedings in the state court, setting up therein an action for $5,390.42, (Record 1-60), and upon the face of the petition originally filed by non-resident petitioner it appears that there is diversity of citizenship and an amount in controversy in excess of $3,000.00, which was submitted by such petition to the jurisdiction of the state court for determination.

In urging the right of removal in the case of BANKERS SECURITY CORPORATION VS. INSURANCE EQUITIES CORPORATION, ET AL, 85 Fed. (2d) 856, 108 A. L. R. 960, we read from the brief of Counsel 108 A. L. R. 961:

"Since plaintiff could not have instituted the action in the District Court of New Jersey in the first instance it is not estopped from removing the action to the Federal Court when it became a de-

fendant by virtue of the defendant's counterclaim." citing:

BALDWIN VS. PACIFIC POWER & LIGHT COMPANY, D. C. 199 Fed. 291; AMERICAN FRUIT GROWERS, INC. V. LA ROCHE, D. C., 39 Fed. (2d) 243.

Petitioner next submits to this Court the opinion in the case of American Fruit Growers, Inc. v. La Roche (1928 D.C.S.C.) 39 Fed. (2d) 243. We note from an examination of that opinion that in that case the plaintiff brought his action in the state court originally for less than $3,000.00; it is reasoned in that case, as follows:

"In the present case, the plaintiff had no choice but to bring its suit in the state court. It, therefore, cannot be said to have waived any right it may have as to any other cause of action."

The Court further stated in its reasoning to authorize a non-resident to have a chance to have its litigation heard in the Federal Court as follows:

"If the removal cannot be had in this case, then a non-resident who has a small claim, less than the jurisdictional amount in the federal courts, against a citizen of another state, must either forego that that claim or must forego his right to a trial in the federal court of any claims that the resident citizen may have against him."

Petitioner urges for consideration the opinion of the District Court of Kansas, rendered in 1928, in the case of SAN ANTONIO SUBURBAN IRRIGATED FARMS V. SHANDY, 29 Fed. (2d) 579, and from that opinion we read:

"Until the coming in of the cross-petition in

this case, the plaintiff had no right to come to a national court. It must either tear up its notes for $3,000 or sue in the state courts. The defendant had an option of pleading defensively only, or filing a cross-petition, asking for affirmative relief. He filed such a cross-petition, asking affirmative relief to the extent of $5,000. This cross-petition will stand, even if plaintiff dismisses its suit. For the first time, then, the non-resident finds itself confronted with a controversy exceeding the jurisdictional amount."

The Shandy case cites the case of WEST V. AURORA, 6 Wall. 139, 18 L. Ed. 819, and argues that that decision was one wherein the amount involved originally was sufficient to enable the plaintiff to have gone into the United States Court at the outset and that since such an option was not present in the Shandy case the right of removal should not be lost. This Shandy case further argues that a non-resident plaintiff who was compelled to go to the State Court in the first instance should be authorized then to remove the cause when confronted with a counter-claim exceeding the jurisdictional amount, and for authority cites:

CARSON LBR. CO. V. HOLTZCLAW, 39 F. 578 (C. C. Mo.);

WALCOTT V. WATSON, 46 F. 529 (C.C. Nev.);

PRICE & HART V. ELLIS & CO., 129 F. 482 (C. C. Ark.);

PIERCE V. DESMOND, 11 F. (2d) 327 (D. C. Minn.);

ZUMBRUNN V. SCHWARTZ, 17 F. (2d) 609 (D. C. Ind.);

CONSOLIDATED TEXTILE CO. V. ISERSON, 294 F. 289 (D.C.N.Y.)

We note that Petitioner in its brief, pages 13-14, outlines numerous authorities, without referring to the opinions of the Courts therein, from these authorities we call the Court's attention to excerpts from the opinions themselves. From MOHAWK RUBBER CO. V. TERRELL, 13 F. (2d) 266, we quote:

"The removal statute (section 1010, U. S. Compiled Statutes 1918) grants the right of removal to 'the defendant or defendants therein to the district court of the United States for the proper district.' It was the purpose of the statute to restrict the right of removal to the defendant or defendants who had no choice in the selection of a forum. It may be that in proper case a litigant, who has been compelled to resort to the state court because of the limited amount in controversy, will enjoy the right, upon the interposition of a counterclaim which is in its nature an independent suit, to remove to the federal court, where the amount is large enough and there is the requisite diversity of citizenship."

From ZUMBRUNN V. SCHWARTZ, 17 F. (2d) 609, we quote:

" . . . Where the original suit is for less than the amount required by the removal statute, and defendant counterclaims for an amount in excess of the amount necessary to allow removal, defendant cannot then demand removal. This seems to be the settled law and is well supported by the authorities. McKOWN V. KANSAS & T. COAL CO. (C. C.) 105 F. 657; LaMONTAGUE V. HARVEY LUMBER CO. (C.C.) 44 F. 645; HANSEN V. PACIFIC

COAST ASPHALT CEMENT CO. (D. C.) 243 F. 283."

In the Zumbrunn v. Schwartz case the Aurora City case was distinguished, setting forth that in the West vs. Aurora City case plaintiff originally sued for more than the jurisdictional amount and hence the plaintiff there could originally have brought his suit in Federal Court but voluntarily chose the forum of the state tribunal; but that in the case at bar, owing to the small amount involved, plaintiff was required to go originally into the state court and that for the first time more than $3,000.00 appeared in the case upon the filing of the cross-action.

The distinction in the WICHITA ROYALTY COMPANY VS. CITY NATIONAL BANK OF WICHITA FALLS, 95 F. (2d) 671, from the case at bar, is set forth in the opinion of the Circuit Court (Record 130-31), and an observation of that case discloses:

"But it is urged that one cause of action, that of the Wichita Royalty Company against the old bank, had been before the state courts for several years and it was too late to remove it, and that the same was true of the suit by the old bank on its notes; and additionally THAT THE OLD BANK COULD NOT REMOVE ITS OWN SUIT. IT IS OF COURSE TRUE THAT NEITHER OF THESE CONTROVERSIES COULD HAVE BEEN INDEPENDENTLY REMOVED AND NEITHER WAS SOUGHT TO BE. They come to the federal court as a part of the case asserted by the Wichita Royalty Company in its new cross bill. That pleading presented for the first time the elements of federal

jurisdiction, and there was no delay in removing thereafter."

From the decision of PIERCE V. DESMOND, 11 F. (2d) 327, wherein the Court cites at length from the opinion of Judge Triber in the case of PRICE & HART VS. T. J. ELLIS & CO., 129 Fed. 482, we submit that the controlling reasons in Pierce vs. Desmond are set out as follows:

"In Price & Hart v. T. J. Ellis & Co., 129 F. 482, (CCED. Ark), Judge Triber states the argument as follows:

'While, under the laws of this state, a defendant is not compelled to set up his counterclaim in that action, but may maintain a separate suit thereon, he has the right to do so, and, as determined by the highest court of the state, it thereupon becomes 'in every respect a cross-action, with the parties reversed.' There is no reason why a nonresident thus involuntarily made a party defendant in an action which judgment for more than $2,000, exclusive of interest and costs, is demanded and can be rendered against him should be deprived of his right to remove the cause to a national tribunal, if he so elects. It is true, he selected the state court as a forum in which to litigate his cause of action when he instituted the suit originally, but, as his claim for which he instituted that suit did not exceed in value the sum of $2,000, exclusive of interest and costs, he had no choice in the selection of the forum, for that was the only court which had jurisdiction of the subject-matter. It was the filing of the counterclaim alone which gave him the right of election, and, if he avails himself of this privilege

within the time prescribed by the statute, 'at or before the time he is required by the laws of the state or the rules of the court to answer or plead,' which can only be done after the filing of the counterclaim, and which must be done 'on or before the calling of the cause for trial, * * * I can conceive of no substantial reason why he should not be entitled to remove the same. * * *

Had the defendants instituted an original action against the plaintiff on their counterclaim, the cause would clearly have been removable, and it was the filing of the counterclaim, although a suit was then pending between the parties, which brought the cause within the terms of the statutes regulating removals of causes from the state to the national courts. The petition for removal in this case was filed by the plaintiff, who became defendants in the cross-action, and were nonresidents of this state, as soon as the facts necessary to confer jurisdiction on this court were made a part of the record, and within the time they were required by the laws of this state to file a reply, and this was the first opportunity they had to elect one of the two forums in which to try their case. Before that time no right of election existed, and, of course, they could exercise none. The motion to remand is overruled'."

From the opinion of Judge Atwell, from the Northern District of Texas, we read from EVETTS V. PEOPLE'S LIFE INSURANCE COMPANY, 36 Fed. (2d) 832:

"The plaintiff contends that the company could have gone into either the national or state court,

and having chosen the state court, it must stay there. Likewise, it is asserted that the plaintiff exhibits a phase of the same matter about which the company was concerned. To use the dangue of learned counsel, it is suggested that the company 'laid its pallet and should rest thereon.'

Written wisdom is not found upon all fours with the question presented here, but is seems to me that the taking of the deposition would not entitle the party who might be interested in the disclosures of the deposition to file a counterclaim or cross-action for an amount in excess of $3,000, and litigate that new cause of action in the state court when the nonresident desired to exercise its right to have the controversy heard in a national court.

The question is not even as difficult as that which arises when a nonresident sues for a sum less than $3,000 in a state court and is met by a cross-action for an amount in excess of $3,000. I think the most satisfactory line of thought upon a predicament of that sort is that the nonresident may remove if and when such a happening takes place. However broad may be the definition of the word 'suit,' it is scarcely broad enough to require that, if a non resident seeks to perpetuate testimony, or to discover testimony concerning a contract in excess of national court jurisdiction, it submits itself in such a proceeding to a cross-action or counter-claim in the domestic court and deprives itself of the right to remove to the national court."

In a well reasoned decision from the Northern District of Maine, we read from the opinion of the Court in HOULTON SAVINGS BANK V. AMERI-

CAN LAUNDRY MACHINE COMPANY, 7 Fed. Sup. 858:

"It is very true that bringing a suit in the state court is an election of a tribunal for the settlement of the rights involved in that suit, and a waiver of any right to change to another jurisdiction. Voluntarily taking the position of a plaintiff would, of itself, on the face of it, deprive that party of the right to remove, under the statute applicable here, in which the right is given to defendants only. In this case, assuming that the replevin suit was actually brought (about which there is some dispute), it was clearly an election to submit the question of the right of possession of the described property, as between the plaintiff and the defendant in that suit, to the court which issued the writ. The defendant here, the laundry company, sued, or started to sue, the hotel company in the state court. If the hotel company had come back with a bill in equity asking that the suit at law be enjoined, the laundry company could not remove thae equity suit to the federal court, though on its face removable, because it had made a clear election to submit the controversy involved to the state tribunal. It had waived its right to carry that controversy into another jurisdiction."

The Circuit Court for the Tenth Circuit in CHAMBERS VS. SKELLY OIL COMPANY, 87 Fed. (2d) 853, in passing on this question simply referred to the opinion in the SAN ANTONIO SUBURBAN IRRIGATED FARMS VS. SHANDY, 29 Fed. (2d) 579, and adopted the reasoning therein stated.

Thus we see from an examination of the decisions

upon which Petitioner relies that those authorities deny the right of a non-resident original plaintiff in the State Court to remove the cause when the original petition filed by such non-resident in the State Court was in excess of $3,000.00 as exists in the case at bar. All of the authorities are in accord, definitely refusing the right of removal to an original non-resident plaintiff, defendant in a counter-claim, when the original non-resident plaintiff instituted suit in the State Court for an amount in excess of $3,000.00.

Point III

The judgment of the Honorable Circuit Court of Appeals reversing the judgment of the District Court and directing that this cause be remanded to the State Court is correct for the further reason that the set-off and counter-claim is not such a suit which is removable under Section 28 of the Judicial Code, as amended.

Much of Petitioner's brief is consumed in an attempt to establish that paragraph VI of defendants' answer, Respondents here, was as cross-action and that type of a suit which is removable under Section 28 of the Judicial Code. This feature is treated in Petitioner's brief and under our argument of Point III from the following angles, to-wit:

(a) Was the $5,000.00 off-set a defensive plea as distinguished from an affirmative plea?

(b) Was the $5,000.00 alleged off-set so directly connected with the suit instituted by plaintiff as should be treated a part thereof?

(c) Would the Federal Court have had original jurisdiction over this off-set and counter-claim had same been filed originally in the Federal Court?

ARGUMENT AND AUTHORITIES UNDER POINT III

The question set forth for determination in the opinion of the Circuit Court in the case at bar was, whether or not a counter-claim set up by a defendant in a state court filed by way of defense and affirmative relief is a suit which is removable by the plaintiff and cross-defendant under Section 28 of the Judicial Code (Record 127-128); the determination by the Circuit Court of Appeals that a non-resident original plaintiff could never become that type of a defendant entitled to removal under Section 28 of the Judicial Code, is supported, as evidenced in Point I and II of Respondent's brief, by the fact not only that petitioner was the non-resident original plaintiff in the State Court, but, likewise, that it was the non-resident original plaintiff instituting a suit in a state court for an amount in excess of $3,000.00; this determination by the Circuit Court made it unnecessary to determine whether or not $5,000.00 of the counter-claim was such a defensive plea as distinguished from an affirmative plea as to deny removal on that ground; likewise, such determination made it unnecessary for the Circuit Court to determine whether or not the $5,000.00 item was so directly connected with the suit originally instituted by plaintiff as to be treated as a part thereof; such a determination by the Circuit Court further made it unnecessary to determine whether or not the Federal District Court could have had original jurisdiction over the purported cross-action and counter-claim. Testing such counter-claim and cross-action by ascertaining whether or not such could have been originally filed in the

Federal District Court, in the event that either of these three points appeared to be lacking removal would be denied and the cause necessarily must be remanded to the State Court from whence it came.

The rule laid down in the case of UNION OIL COMPANY OF CALIFORNIA VS. SPRADLEY, 49 Fed. (2d) 815, is to the effect that a cross-complaint if properly in the case, although it was a cross-complaint for more than the jurisdictional amount, nevertheless, such would not support removal to the Federal Court because removal was sought by the non-resident original plaintiff; the Court, in that case further argued that in the event this cross-complaint was not properly in the case then surely if it was improperly in the case it could not confer jurisdiction on the Federal Court as an independent action.

Only defensive matters were urged with reference to the $5,000.00 contended by non-resident original plaintiff to be a counter-claim, in that such plea did not ask for affirmative relief and did not plead affirmative damages and was strictly in the nature of an off-set, defensive in its nature, setting forth from a legal standpoint that the payment of the $5,000.00 out of the obligation was payable out of a specific fund, which fund had not come into existence.

The damage clause of paragraph VI of Respondents' answer sets forth damages in the sum of $5,000.00, which should be allowed as an off-set to any claim which plaintiff may have herein (Record 68), this allegation itself, being the allegation of damages, evidences that the $5,000.00 should be allowed only upon the contingency that the Petitioner as original plaintiff be successful in its claim for a judgment

on account and does not set forth that same should be allowed as an off-set in any event, but only as one to any claim which plaintiff may have herein.

In begging the question as to what is a defensive off-set and what amounts to an affirmative cross-action the brief of Petitioner reflects that the claim of these Respondents is for $7,200.00, the only place where this is taken from the pleadings of Respondents appears in the prayer of the Respondents, and for the purposes of removal the prayer is not a part of the pleading and the question of removability is determined alone by plaintiff's bona fide allegations, and the prayer to such allegations is not a part thereof.

HAENNI VS. CRAVEN, 56 Federal (2d) 261;
JENNINGS VS. RAY, 7 Fed. Sup. 417;
HART VS. MARTIN, 299 S. W. 520;
COLLINS VS. MARTIN, 6 S. W. (2d) 126;
MORRISSEY VS. JONES, 24 S. W. (2d) 1101;
CRETIEN VS. KINCAID, 84 S. W. (2d) 1094, affirmed in KINCAID VS. CRETIEN, 111 S. W. (2d) 1098;
CITY OF FLOYDADA V. GILLIAM, 111 S. W. (2d) 761.

Removability of a cause of action must be determined by the well pleaded facts of plaintiff's petition as viewed by the laws of state and the matters of defense urged therein furnish no grounds for removal.

BEAUMONT VS. TEXAS & N. O. R. C., 296 Fed. 523;
OHIO EX REL, SENEY VS. SWIFT & CO. 270 Fed. 141;

VISAYAN REFINING CO. VS. STANDARD TRANSPORTATION CO., 17 Fed. (2d) 642;
LEONARD VS. ST. JOSEPH LEAD CO., 75 Fed, 390;
MOULTON VS. NATIONAL FARMERS BANK, 27 Fed. (2d) 403;
MEYER BROS. DRUG VS. DOLLAR, S. S. line, 44 Fed. (2d) 57;
GLOVER MACHINE WORK VS. COOK JELLICO COAL CO., 222 Fed. 531;
LYNCH VS. YELLOW CAB CO., 12 Fed. Sup. 926.

An ascertainment as to whether or not this pleading appearing in Paragraph VI of Respondents' original answer is that type of an off-set amounting to payment, or whether it is that type of a set-off which may be urged either affirmatively or defensively, or as to whether or not such action is simply an affirmative pleading is set forth in 38 TEXAS JURISPRUDENCE 284-286, as follows:

"SET-OFF.—'Set-Off is the doctrine of bringing into the presence of each other the obligations of A to B and B to A, and by judicial action of the court making each obligation extinguish the other. By virtue of the statute, the defendant may avail himself of that juxtaposition and pro tanto mutual cancellation of liabilities by way of defense as well as assert a claim for judgment for any balance there may be in his favor. A set-off is a cross-action or in the nature of a cross-action, and is regarded as a separate suit, or in the nature of a separate suit, by the defendant against the plaintiff in the main suit. Ordinarily, only the defendant may plead in set-off, and when the plaintiff

intriduces a new cause of action in addition to that upon which his suit is brought, it must be done by amendment of his original pleading. But the plaintiff may set up a judgment recovered against him in another suit, and ask that it be credited against the defendant's claim, regardless of whether it is permissible for him to plead a set-off for the defendant.

Except as the rule has been modified by the statute, set-off comprehends only liquidation damages, or those capable of being ascertained by calculation, and in this respect is distinguished from recoupment. It is not as broad or extensive in its scope as a plea in reconvention. And it is also to be distinguished from compensation, which it resembles—the difference being that in set-off the debts are not in themselves, and of right, extinguished; that the right of set-off is merely defensive to the action for the debt; and that the defendant is not obligated to avail himself of it, but may, at his option, pay, or on other grounds contest, the one debt, and bring a separate action for the other.

Set-off is the creation of the statute, but is permissible in equity in some circumstances independently of the statute. It was taken from the civil law, and is unknown to the common law, under which each party is left to his cross-action for the collection of the respective debts."

Many thousands of dollars of charges and many thousands of dollars of off-sets were plead in petitioners' original suit (Record 1-60); and paragraph VI of respondents' answer sought to compel the petitioner, as original plaintiff, to prove under its sworn

account that no other lawful off-sets existed to this account, and specifically set up the contract whereby $5,000.00 of the difference between the off-sets and charges was to be paid by a hauling contract. Allegations in an answer which serve to compel the plaintiff to prove his own cause of action are strictly defensive pleadings and do not present a cross-action or counter-claim.

COMMERCIAL CREDIT COMPANY VS. WILSON, 219 S. W. 298; HOODLESS V. WINTER, 80 Texas 638, 16 S. W. 427.

It has long been ruled that where facts alleged in a cross-bill are purely defensive in their nature and such as may properly be alleged by way of answer no right of removal can be acquired by presenting them in the form of a cross-bill.

FEDERAL CYCLOPEDIA OF PROCEDURE, Vol. 1, page 969;

TORRENCE VS. SHEDD, 144 U. S. 527, 36 L. Ed. 528.

A ready reference to Article 3736, Revised Civil Statutes of Texas, as amended, as disclosed in Note 1 of Petitioner's appendix, reflects that the answer of a defendant in a State Court to a verified itemized statement of account may be sworn to on the day of the trial thereof, and such point was never reached in the State Court. This article requires the plaintiff claiming under the verified account to state in his affidavit that "all just and lawful offsets, payments and credits have been allowed" (Record 60). The $5,000.00 off-set pleaded was such an offset, payment or credit which was defensive to the account sued upon.

Defensive pleas such as payment, off-set, credit, void by reason of violation of the anti-trust statutes, barred by limitations, or any defense going to plaintiff's right to recover either all or any part thereof is permitted under Texas practice even though the verified account was not denied under oath at the time of "announcment for ready for trial in said cause."

McCONNON & CO. VS. KLENK, 11 S. W. (2d) 222;
HOOD VS. ROBERTSON, 33 S. W. (2d) 882;
J. M. BRADFORD GROCERY CO. VS. PORTER, 17 S. W. (2d) 145;
KIMBROUGH VS. VACUUM OIL CO., 289 S. W. 151;
MARATHON OIL CO. VS. HADLEY, 107 S. W. (2d) 883.

In so far as the $5,000.00 item, termed an off-set, is concerned two things must be shown before same could come into existence so as to ripen into a judgment and these factors are: (1) the existence of a cause of action in favor of Petitioner, as original plaintiff, in a sum in excess of $5,000.00; and, (2) the agreement to allow as a credit or an off-set to such account as established by plaintiff an amount in the sum of $5,000.00.

Turning now to the second question urged under Point III it can be readily determined that the $5,000.00 item urged by the Respondents, as defendants below, is directly connected with the suit as instituted by plaintiff, in that it depends upon the existence of a cause of action in favor of Petitioner, as original plaintiff, before it could come into existence, and in the event the Petitioner, original plaintiff below, dismissed its cause of action against the Respondents

there would remain only $2,200.00 in Respondents' pleadings left to be determined. Likewise should the Respondents prevail in their defense that there is a violation of the anti-trust statutes of Texas as urged in their answer, prior to this off-set, (Record 65-67), then the $5,000 item goes out, because as plead it is dependent upon petitioner, as original plaintiff, recovering a sum of more than $5,000.00, to be paid for by specific performance of the hauling contract.

It was held, in MATHIS V. LIGON, ET AL, 39 F. (2d) 455, that

> "A cross-bill is a pleading filed by a defendant in suit against the plaintiff in the same suit or against the other defendants in the same suit, or against both, touching the matters in question in the original bill. It must be either in aid of a defense to the original bill or to obtain full relief to all parties touching the matters of the original bill.
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> MORGAN'S CO. V. TEXAS CENT. RY., 137 U. S. 181, 200, 201, 11 S. Ct. 61, 34 L. Ed. 625; LANDON V. PUBLIC UTILITIES CO. (D.C.) 234 F. 162, 167; 21 C. J., p. 498, sec. 597. Such a cross-bill is ancillary to the original suit and, if the court has jurisdiction of the case made by the original bill, it has jurisdiction of a dependent cross-bill. RICKEY L. & CO. V. MILLER & LUX, 218 U. S. 258, 263, 31 S. Ct. 11, 54 L. Ed. 1032; RAILROAD CO. V. CHAMBERLAIN, 6 Wall. 748, 18 L. Ed. 859, OSBORNE & CO. V. BARGE (C.C.) 30 F. 805; FIRST NAT. BANK OF SALEM V. SALEM CAPITAL FLOUR MILLS (C.C.) 31 F. 580; FREEMAN V. HOWE, 24 How. 450, 460 16 L. Ed. 749; BROOKS V. LAURENT (CCA 5) 98 F. 647, 652."

From the proposition that where jurisdiction is acquired over a claim it attaches also to all matters ancillary and incidental to that claim by necessary impliction has been developed the doctrine that jurisdiction over the original claim embraces power to determine any counter-claim involving the same subject matter as the original claim and dependent on it, so that it relates to substantially the same controversy and its disposition is necesary to afford complete relief to the parties.

MORGAN L. & T. R. & S. S. CO. V. TEXAS C. R. CO., 137 U. S. 171, 34 L. Ed. 625, 11 S. Cr. 61;
RICKEY, L. & C. CO. V. MILLER, 218 U. S. 258, 54 L. Ed. 1032, 31 SCR 11;
AMES REALTY CO. V. BIG INDIAN MIN. CO., (CC-Mont), 146 Fed. 166;
U. S. V. MACKEY, (DC-Okla), 214 Fed. 137;
CLEVELAND E. CO. V. GALION D. M. T. CO., (DC-Ohio), 243 Fed. 405;
BADGER V. E. B. BADGER & SONS CO., (D.C.-Mass.), 288 Fed. 419;
MATHIS V. LIGON, (CCA 10) 39 Fed. (2d) 455.

Thus, it is outlined in MOHAWK RUBBER CP. OF NEW YORK, INC. V. TERRELL, 13 F. (2d) 266, that in an instance wherein plaintiff instituted its suit in the State Court against the defendant, upon an account for goods and merchandise purchased, and sued for $1,672.69, and in due time defendant filed a counter-claim; that a careful examination of the counter-claim shows that it is in its nature an off-set or defensive matter; in that case it was true that the amount demanded in the counter-claim aggregated more than $10,000.00, but it was so inter-

woven with the main issue as to free it from the suggestion of an independent suit. It was there stated that in a proper case, where a litigant was compelled to resort to the State Court originally because of the limited amount in controversy he would enjoy the right, upon imposition of a counter-claim for more than $33,000.00, to remove, provided the counter-claim is in its nature an independent suit.

It will be noted that in the case at bar plaintiff is suing upon a running account, claiming debts in the amount of $26,066.66, and avering that the credits to which defendants were entitled aggregated $20,676.24, the suit by appellee being for the remainder, or $5,390.42; one of the issues which appellee contemplated that the State Court would take into consideration was the earnings on a truck, for which a credit was given, (Record 59), on April 13, 1939, and a debit item relative to the operation of the truck appeared on December 13, 1938, (Record 56); the Petitioner's petition recognized that whatever credits existed by virtue of the operation of the truck were called to the attention of the Court for final determination. Definitely, that which Petitioner now contends to be an independent suit is so inter-twined with and related to the debit and credit items as to be ancillary to the principal cause of action and is in fact of a defensive nature.

It, likewise, has been long established that a suit on a single cause of action is not removable, though a separate issue under a separate defense is raised.

ST. LOUIS & S. F. R. CO V. WILSON, 114 U. S. 60, 29 L. Ed. 66;
54 CORPUS JURIS 293.

Moving then to the third point urged under Point III we see that the cross-complaint or counter-claim, whichever it may be, must necessarily be limited to $2,200.00, which is less than the jurisdictional amount. The only assumption whereby the $5,000.00 item as plead by Respondents, defendants below, could be considered as a cause of action which could have been filed in the Federal Court, originally, is to assume that it was filed for the purpose of asking the Court for a declaratory judgment; a declaratory judgment is not known in Texas law.

Likewise, where an original plaintiff had instituted its cause of action and a cross-action was urged thereto and the original plaintiff attempted to dismiss its original suit and remove the cross-action the Commission of Appeals refused this right, in the case of McELYEA, ET AL V. PARKER, 81 S. W. (2d) 649.

An observation of the pleadings will reflect that this paragraph VI in question, in so far as $5,000.00 thereof is concerned, was a plea of payment and a defensive plea, since no declaratory judgment could be asked for in a State Court of Texas. Reading from 38 TEXAS JURISPRUDENCE 373, supported by the authorities cited therein, we see:

"A sound and safe test for determining whether a claim pleaded by the defendant is to be regarded as a payment and satisfaction pro tanto of the claim of the opposite party, or simply as a counterclaim or set-off which may be asserted in satisfaction thereof, is to inquire whether the defendent could have maintained a suit to enforce the

claim before suit was brought by the plaintiff. If he could have maintained such an independent suit the claim will be regarded as a set-off or counter-claim, and not a payment; while if he could not have maintained such a suit, it is a payment."

CONCLUSION

Petitioner, as non-resident plaintiff, in the original action, voluntarily selected the forum of the State Court in an action involving in excess of $3,000.00, wherein diversity of citizenship appeared upon the face of the petition as originally filed; for all of the reasons outlined in Point I and Point II of this brief Petitioner is not that type of a defendant to whom is available the petition for removal; likewise, the action sought to be removed is not that type of action which can be removed under the removal act, because such action is so far as it relates to $5,000.00 thereof is a defensive plea as distinguished from an affirmative plea and is so directly connected with the charges and off-sets and the manner of payment thereof as to be a part of the same transaction, and the cause of action, if any there be, as urged by the cross-action is between the identical plaintiff and identical defendant in the original suit filed by petitioner; the purported off-set and cross-action is not that type of an action which could be filed directly in the Federal Court in the first instance.

For the reasons advanced herein it is respectfully urged that the judgment of the Honorable Circuit Court of Appeals herein, should be affirmed, and the

Trial Court should be directed to remand this case to the State Court, for which relief the Respondents pray.

Respectfully submitted,
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and
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P. 2

SUPREME COURT OF THE UNITED STATES.

No. 727.—October Term, 1940.

The Shamrock Oil and Gas Corporation, Petitioner, *vs.* G. Obie Sheets and Chester Sheets, Doing Business as Friona Independent Oil Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[April 28, 1941.]

Mr. Justice Stone delivered the opinion of the Court.

Respondent, a citizen of Texas and defendant in a court of that state set up, by way of counterclaim or cross-action against petitioner, the non-citizen plaintiff in the suit, a cause of action for damages in excess of $3,000 for breach of a contract, which was separate and distinct from the alleged indebtedness sued upon by the petitioner. The question for decision is whether the suit in which the counterclaim is filed, is one removable by the plaintiff to the federal district court on grounds of diversity of citizenship under § 28 of the Judicial Code, 28 U. S. C. § 71.

The plaintiff in the state court removed the cause to the United States District Court for Northern Texas, which denied respondent's motion to remand. After a trial on the merits it gave judgment for petitioner, plaintiff below, both on the cause of action set up on its complaint in the suit and on the counterclaim. The Court of Appeals for the Fifth Circuit reversed, 115 F. (2d) 880, and ordered the cause remanded to the state court on the ground that the plaintiff in the state court was not a "defendant" within the meaning of § 28 of the Judicial Code, and so was not entitled to remove the cause under that section, which in terms authorizes the removal of a suit subject to its provisions only "by the defendant or defendants therein". We granted certiorari March 10, 1941, to resolve the conflict of the decision of the court below and that of *Waco Hardware Co.* v. *Michigan Stove Co.*, 91 Fed. 289; see *West* v. *Aurora City*, 6 Wall. 139, with numerous decisions of other circuit courts of appeals. *Carson & Rand Lbr. Co.* v. *Holtzclaw*, 39 Fed.

578; *Bankers Securities Corp.* v. *Insurance Equities Corp.*, 85 F. (2d) 856; *Chambers* v. *Skelly Oil Co.*, 87 F. (2d) 853, and cases cited in note 5 of the opinion below, 115 F. (2d) 880, 882.

We assume for purposes of decision, that if the cause was removable by petitioner, the removal proceedings were regular and timely; that respondent's counterclaim stated an independent cause of action and that the amount in controversy in that action exceeded the jurisdictional amount, and we confine our decision to the question of statutory construction raised by the petition for certoirari.

Petitioner argues that although nominally a plaintiff in the state court it was in point of substance a defendant to the cause of action asserted in the counterclaim upon which, under Texas procedure, judgment could go against the plaintiff in the full amount demanded. *Peck* v. *McKellar*, 33 Tex. 234; *Gimmel & Son* v. *Gomprecht & Co.*, 89 Tex. 497; *Harris* v. *Schlinke*, 95 Tex. 88. But at the outset it is to be noted that decision turns on the meaning of the removal statute and not upon the characterization of the suit or the parties to it by state statutes or decisions. *Mason City & Ft. Dodge Ry. Co.* v. *Boynton*, 204 U. S. 570. The removal statute which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied. Hence the Act of Congress must be construed as setting up its own criteria, irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts. Cf. *Hammel* v. *Burnet*, 287 U. S. 103, 110.

Section 28 of the Judicial Code authorizes removal of the suits to which it applies "by the defendant or defendants therein".[1] During the period from 1875 to 1887 the statute governing removals, 18 Stat. 470, specifically gave to "either party" to the suit the privilege of removal. At all other periods since the adoption of the Judiciary Act of 1789 the statutes governing removals have in

[1] "Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction, in any State court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction, in any State court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that State. . . . And where a suit is brought in any State court, in which there is a controversy between a citizen of the State in which the suit

terms given the privilege of removal to "defendants" alone, except the Act of 1867, 14 Stat. 588, continued as part of § 28 of the Judicial Code, which permits either plaintiff or defendant to remove where there is the additional ground of prejudice and local influence.

Section 12 of the Judiciary Act of 1789, 1 Stat. 79, declared that "if a suit be commenced in any state court against an alien . . . or . . . against a citizen of another state, and the matter in dispute exceeds" the jurisdictional amount "and the defendant shall, at the time of entering his appearance in such state court file a petition for removal of the cause," it shall be removable to the circuit court. In *West* v. *Aurora City*, 6 Wall. 139, this Court held that removal of a cause from a state to a federal court could be effected under § 12 only by a defendant against whom the suit is brought by process served upon him. Consequently a non-citizen plaintiff in the state court, against whom the citizen-defendant had asserted in the suit a claim by way of counterclaim which, under state law, had the character of an original suit, was not entitled to remove the cause. The Court ruled that the plaintiff, having submitted himself to the jurisdiction of the state court, was not entitled to avail himself of a right of removal conferred only on a defendant who has not submitted himself to the jurisdiction.

By § 3 of the Act of 1875, the practice on removal was greatly liberalized. It authorized "either party or any one or more of the plaintiffs or defendants entitled to remove any suit" from the state court to do so upon petition in such suit to the state court "before or at the term at which said cause could be first tried and before the trial thereof". These provisions were con-

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is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the district court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said district court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause. . . . At any time before the trial of any suit in any district court, which has been removed to said court from a State court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said State court, the district court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in said State court, it shall cause the same to be remanded thereto. . . ."

tinued until the adoption of the provisions of the present statute so far as now material, by the Act of 1887, 24 Stat. 552.

We cannot assume that Congress, in thus revising the statute, was unaware of the history which we have just detailed,[2] or certainly that it regarded as without significance the omission from the earlier act of the phrase "either party", and the substitution for it of the phrase authorizing removal by the "defendant or defendants" in the suit, or the like omission of the provision for removal at any time before the trial, and the substitution for it of the requirement that the removal petition be filed by the "defendant" at or before the time he is required to plead in the state court.

We think these alterations in the statute are of controlling significance as indicating the Congressional purpose to narrow the federal jurisdiction on removal by reviving in substance the provisions of § 12 of the Judiciary Act of 1789 as construed in *West* v. *Aurora City, supra.* See H. Rept. No. 1078, 49th Cong., 1st Sess., p. 1. If, in reenacting in substance the pertinent provisions of § 12 of the Judiciary Act, Congress intended to restrict the operation of those provisions or to reject the construction which this Court had placed upon them, by saving the right of a plaintiff, in any case or to any extent, to remove the cause upon the filing of a counterclaim praying an affirmative judgment against him, we can hardly suppose that it would have failed to use some appropriate language to express that intention. That its omission of the reference in the earlier statute to removal by "either party" was deliberate is indicated by the committee reports which recommended the retention of the provisions of the Act of 1867 for removal by either

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[2] See H. Rept. No. 1078, 49th Cong., 1st Sess., p. 1:

"The next change proposed is to restrict the right to remove a cause from the State to the Federal court to the defendant. As the law now provides, either plaintiff or defendant may remove a cause. This was an innovation on the law as it existed from 1789 until the passage of the act of 1875.

"In the opinion of the committee it is believed to be just and proper to require the plaintiff to abide his selection of a forum. If he elects to sue in a State court when he might have brought his suit in a Federal court there would seem to be, ordinarily, no good reason to allow him to remove the cause. Experience in the practice under the act of 1875 has shown that such a privilege is often used by plaintiffs to obtain unfair concessions and compromises from defendants who are unable to meet the expenses incident to litigation in the Federal courts remote from their homes.

"The committee, however, believe that when a plaintiff makes affidavit that from prejudice or local influence he believes that he will not be able to obtain justice in the State court he should have the right to remove the cause to the Federal court. The bill secures that right to a plaintiff."

plaintiff or defendant when an additional ground of removal is prejudice and local influence. See H. Rept., *op. cit., supra*, p. 2.

The cases in the federal courts on which petitioner relies have distinguished the decision in *West* v. *Aurora City, supra*, on the ground that it arose under an earlier statute. But we find no material difference upon the present issue between the two statutes, and the reasoning of the Court in support of its decision is as applicable to one as to the other. In some of those cases it is suggested also that a plaintiff who brings his suit in a state court for less than the jurisdictional amount does not waive his right to remove, upon the filing of a counterclaim against him. And petitioner argues that this is so even when, as in the present case the plaintiff's demand is in excess of the jurisdictional amount. But we think the amount of the plaintiff's demand in the state court is immaterial, for one does not acquire an asserted right by not waiving it and the question here is not of waiver but of the acquisition of a right which can only be conferred by Act of Congress. We can find no basis for saying that Congress, by omitting from the present statute all reference to "plaintiffs," intended to save a right of removal to some plaintiffs and not to others. The question of the right of removal, decided in *Wichita Royalty Co.* v. *City National Bank of Wichita Falls*, 95 F. (2d) 671, 674, on which petitioner also relies, was not presented to or passed upon by this Court. 306 U. S. 103. It involved factors not here present which we find it unnecessary to consider.

Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation. The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. "Due regard for the rightful independence of state governments which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined". *Healy* v. *Ratta*, 292 U. S. 263, 270; see *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 233, 234; *Matthews* v. *Rogers*, 284 U. S. 521, 525; cf. *Elgin* v. *Marshall*, 106 U. S. 578.

Affirmed.